No. 98-470



In The

# Supreme Court of the United States

October Term, 1998

RUHRGAS AG,

*Petitioner,*

v.

MARATHON OIL COMPANY,
MARATHON INTERNATIONAL OIL COMPANY,
and MARATHON PETROLEUM NORGE A/S,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## JOINT APPENDIX
## VOLUME I, PAGES 1 TO 254

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**Petition For Certiorari Filed September 18, 1998**
**Certiorari Granted December 7, 1998**

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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VOLUME II





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## RELEVANT DOCKET ENTRIES

U.S. District Court
TXS – Southern District of Texas (Houston)

CIVIL DOCKET FOR CASE #: 95-CV-4176

| | | |
|---|---|---|
| 8/21/95 | 1 | NOTICE OF REMOVAL; filed FILING FEE $ 120.00 RECEIPT # 450373 (ph) [Entry date 08/24/95] |
| | * * * | |
| 8/28/95 | 4 | MOTION to dismiss under Fed.R.Civ.P. 12(b)(2), (4) and (5) by Ruhrgas A G, Motion Docket Date 9/17/95 [4-1] motion, filed. (fs) [Entry date 08/29/95] |
| 8/28/95 | 5 | MEMORANDUM by Ruhrgas A G in support of [4-1] motion to dismiss under Fed.R.Civ.P. 12(b)(2), (4) and (5), filed (fs) [Entry date 08/29/95] |
| 8/28/95 | 6 | MOTION for stay pending arbitration by Ruhrgas A G, Motion Docket Date 9/17/95 [6-1] motion, filed. (fs) [Entry date 08/29/95] |
| 8/28/95 | 7 | MEMORANDUM by Ruhrgas A G in support of [6-1] motion for stay pending arbitration, filed (fs) [Entry date 08/29/95] |
| 8/28/95 | 8 | MOTION to dismiss on forum non conveniens grounds by Ruhrgas A G, Motion Docket Date 9/17/95 [8-1] motion, filed. (fs) [Entry date 08/29/95] |

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| 8/28/95 | 9 | MEMORANDUM by Ruhrgas A G in support of [8-1] motion to dismiss on forum non conveniens grounds, filed (fs) [Entry date 08/29/95] |

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| 9/15/95 | 12 | MOTION to remand by Pltfs Marathon Oil Company, Marathon Intl Oil Co, and Marathon Petro Norge, Motion Docket Date 10/5/95 [12-1] motion, filed w/exhibits (bh) [Entry date 09/18/95] |
| 9/15/95 | 13 | BRIEF in support of their [12-1] motion to remand by Pltfs Marathon Oil Co. Marathon International Oil Co, and Marathon Petroleum Norge A/S, filed (bh) [Entry date 09/18/95] |
| 9/15/95 | 14 | Pltf's MOTION to stay pending resolution of their motion to remand by Marathon Oil Company, Marathon Intl Oil Co, Marathon Petro Norge, Motion Docket Date 10/5/95 [14-1] motion, filed. (ej) [Entry date 09/18/95] |
| 9/18/95 | 15 | Pltf's RESPONSE by Marathon Oil Company, Marathon Intl Oil Co, Marathon Petro Norge to Deft's [8-1] motion to dismiss for insufficiency of process, on forum non conveniens grounds, or to quash service, filed. (ej) [Entry date 09/20/95] |



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| 9/18/95 | 17 | Pltf's STIPULATION re: time to respond to outstanding motions, by Marathon Oil Company, Marathon Intl Oil Co, Marathon Petro Norge, filed. (ej) [Entry date 09/20/95] |
| 9/18/95 | 18 | Pltf's RESPONSE by Marathon Oil Company, Marathon Intl Oil Co, Marathon Petro Norge to Deft's [6-1] motion for stay pending arbitration, filed. (ej) [Entry date 09/21/95] |
| 9/22/95 | 19 | ORDER approving [17-1] stipulation as to response due date to pltfs' motion to remand, extended to 12/1/95, entered; Parties notified. (signed by Judge Melinda Harmon) (fs) [Entry date 09/25/95] |

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| 10/4/95 | 22 | MOTION for order staying merits discovery, deferring Rule 26(f) meeting and Rule 26(a) Initial Disclosures, and authorizing limited discovery on subject matter jurisdiction and personal jurisdiction issues by Ruhrgas A G, Motion Docket Date 10/24/95 [22-1] motion, 10/24/95 [22-2] motion, 10/24/95 [22-3] motion, filed. (fs) [Entry date 10/05/95] |
| 10/5/95 | 23 | RESPONSE by Ruhrgas A G to pltfs' [14-1] motion to stay |

pending resolution of their motion to remand, filed. (fs) [Entry date 10/10/95]

10/12/95 24 REPLY by Ruhrgas A G to pltfs' response to [6-1] motion for stay pending arbitration, filed (fs) [Entry date 10/16/95]

10/12/95 25 REPLY by Ruhrgas A G to pltfs' response to [4-1] motion to dismiss under Fed.R.Civ.P. 12(b)(2), (4) and (5), filed (fs) [Entry date 10/16/95]

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10/20/95 27 STIPULATION re: Rule 26(a) Initial Disclosures by Marathon Oil Company, Marathon Intl Oil Co, Marathon Petro Norge, Ruhrgas A G, filed. (ej) [Entry date 10/24/95]

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10/25/95 30 RESPONSE by Marathon Oil Company, Marathon Intl Oil Co. Marathon Petro Norge to deft's [22-1] motion for order staying merits discovery, [22-2] motion deferring Rule 26(f) and Rule 26(a) Initial Disclosures, [22-3] motion authorizing limited discovery on subject matter jurisdiction and personal jurisdiction issues, filed. (fs) [Entry date 10/26/95]

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11/2/95 32 REPLY by Ruhrgas A G to pltfs' response to deft's [22-1] motion for order staying merits discovery, [22-2] motion deferring Rule meeting and Rule 26(a) Initial Disclosures, [22-3] motion authorizing limited discovery on subject matter and personal jurisdiction issues, filed (fs) [Entry date 11/03/95]

11/6/95 33 MEMORANDUM AND ORDER: On 11/6/95 a Rule 16 Conference and Motion hearing were conducted. A Scheduling Order was entered and upon the agreement of the parties deft's response to motion to remand is due 12/1/95; Response to motion reset to 12/1/95 for [12-1] motion to remand, entered. Parties notified. (signed by Magistrate Judge Frances H. Stacy) (fs) [Entry date 11/15/95]

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11/15/95 36 MEMORANDUM AND ORDER denying [4-1] motion to dismiss under Fed.R.Civ.P. 12(b)(2), (4) and (5) granting [10-1] motion to seal gas sales agreement granting in part, denying in part [22-1] motion for order staying merits discovery granting [22-2] motion deferring Rule 26(f) meeting and Rule 26(a) Initial Disclosures granting in part, denying in part [22-3] motion

authorizing limited discovery on subject matter jurisdiction and personal jurisdiction issues granting in part, denying in part [14-1] motion to stay pending resolution of their motion to remand, entered. Parties notified. (signed by Judge Melinda Harmon) (fs) [Entry date 11/16/95]

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| 11/15/95 | 38 | MEMORANDUM AND ORDER denying Ruhrgas's [6-1] motion for stay pending arbitration, entered. Parties notified. (signed by Melinda Harmon) (ph) [Entry date 11/17/95] |
| 11/21/95 | 39 | MOTION for reconsideration of [38-1] order denying motion for stay pending arbitration, or in the alternative to vacate and defer ruling pending discovery by Ruhrgas A G, Motion Docket Date 12/11/95 [39-1] motion, 12/11/95 [39-2] motion, filed. (large pleading, in brown expandex folder) (fs) [Entry date 11/27/95] [Edit date 11/27/95] |

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| 12/4/95 | 42 | RESPONSE by Marathon Oil Company, Marathon Intl Oil Co, Marathon Petro Norge to deft Ruhrgas' [39-1] motion for reconsideration of [38-1] order |



denying motion for stay pending arbitration, filed. (fs) [Entry date 12/07/95]

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| 12/22/95 | 47 | REPLY by Ruhrgas A G to pltfs' response to Ruhrgas' [39-1] motion for reconsideration of [38-1] order denying motion for stay pending arbitration, filed (fs) [Entry date 01/02/96] |

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|---|---|---|
| 1/4/96 | 51 | MOTION to extend deadlines by Marathon Oil Company, Marathon Intl Oil Co, Marathon Petro Norge, Docket Date 1/24/96 [51-1] motion, filed. (fs) [Entry date 01/05/96] |
| 1/9/96 | 53 | Pltfs' SURREPLY BRIEF regarding deft's [39-1] motion for reconsideration of [38-1] order denying motion for stay pending arbitration, filed (fs) [Entry date 01/12/96] |
| 1/9/96 | 54 | AMENDED MOTION to extend deadlines by Marathon Oil Company, Marathon Intl Oil Co, Marathon Petro Norge, Motion Docket Date 1/29/96 [54-1] motion, filed. (fs) [Entry date 01/12/96] |
| 1/9/96 | 55 | RESPONSE by Ruhrgas A G to pltfs' [54-1] amended motion to extend deadlines, filed. (bj) [Entry date 01/16/96] |

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| 1/11/96 | 52 | ORDER granting pltfs' [51-1] amended motion to extend deadlines; discovery on all personal jurisdiction and related issues must be completed by 1/26/96; Motion Docket Date 2/8/96 [4-1] motion to dismiss for lack of personal jurisdiction, 2/8/96 [8-1] motion to dismiss on forum non conveniens grounds, 2/8/96 [12-1] motion to remand, entered; Parties notified. (signed by Judge Melinda Harmon) (fs) [Entry date 01/12/96] |
| 1/11/96 | 56 | REPLY BRIEF by Marathon Oil Company, Marathon Intl Oil Co, Marathon Petro Norge in support of [54-1] motion to extend deadlines, filed. (fs) [Entry date 01/17/96] |
| 1/12/96 | 57 | SUPPLEMENT to [8-1] motion to dismiss on forum non conveniens grounds by Ruhrgas A G, filed. (fs) [Entry date 01/17/96] |
| 1/16/96 | 58 | MOTION for leave to file brief for the Federal Republic of Germany as Amicus Curiae in support of Ruhrgas with memorandum of points and authorities, by Federal Rep. Germany, Motion Docket Date 2/5/96 [58-1] motion, filed. |



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| 1/23/96 | 59 | RESPONSE by Ruhrgas A G to pltf's surreply brief regarding deft's [39-1] motion for reconsideration of [38-1] order denying motion for stay pending arbitration, filed (fs) [Entry date 01/25/96] |
| 1/24/96 | 60 | ORDER granting [58-1] motion for leave to file brief for the Federal Republic of Germany as Amicus Curiae in support of Ruhrgas, entered; Parties notified. Pltfs shall have until 2/8/96 to file any response to the amicus brief. (signed by Judge Melinda Harmon) (ph) [Entry date 01/26/96] |
| 2/8/96 | 61 | RESPONSE by Marathon Oil Company, Marathon Intl Oil Co. Marathon Petro Norge to [58-1] motion for leave to file brief for the Federal Republic of Germany as Amicus Curiae in support of Ruhrgas, filed. (fs) [Entry date 02/09/96] |
| 2/8/96 | 62 | RESPONSE by Marathon Oil Company, Marathon Intl Oil Co, Marathon Petro Norge to Ruhrgas' [9-1] memorandum in support of motion to dismiss on forum non conveniens grounds, filed. (fs) [Entry date 02/09/96] |

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| 2/8/96 | 63 | RESPONSE by Marathon Oil Company, Marathon Intl Oil Co, Marathon Petro Norge to Ruhrgas' motion to dismiss for lack of personal jurisdiction, filed. (w/2 brown expandex folders containing exhibits, vols 1, 2, 3, 4 & 5) (fs) [Entry date 02/09/96] |
| 2/8/96 | 64 | RESPONSE by Ruhrgas A G to [12-1] motion to remand, filed. (w/2 brown expandex folders containing exhibits, vols 1 and 2) (fs) [Entry date 02/09/96] |
| 2/16/96 | 65 | REPLY by Ruhrgas A G to response to [4-1] motion to dismiss under Fed.R.Civ.P. 12(b)(2), (4) and (5), (w/2 volumes of exhibits in brown expandex folder), filed (fs) [Entry date 02/21/96] [Edit date 02/21/96] |
| 2/16/96 | 66 | REPLY by Ruhrgas A G to pltfs' response to [8-1] motion to dismiss on forum non conveniens grounds, filed (fs) [Entry date 02/21/96] |
| 2/22/96 | 67 | REPLY BRIEF by Marathon Oil Company, Marathon Intl Oil Co, Marathon Petro Norge in support of [12-1] motion to remand, filed. (This instrument is in brown expandex folder) (fs) [Entry date 02/26/96] |



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| 3/1/96 | 68 | SURREPLY to [67-1] brief by Ruhrgas A G, filed. (mis) [Entry date 03/06/96] |
| 3/5/96 | 69 | SURREPLY to [4-1] motion to dismiss (for lack of personal jurisdiction) under Fed.R.Civ.P. 12(b)(2), (4) and (5) by Marathon Oil Company, Marathon Intl Oil Co. Marathon Petro Norge, filed. (fs) [Entry date 03/07/96] |
| 3/8/96 | 70 | Deft's RESPONSE by Ruhrgas A G to Pltf's Surreply to motion [69-1] to dismiss for lack of personal jurisdiction, filed. (ej) [Entry date 03/12/96] |
| 3/20/96 | 71 | RESPONSE by Marathon Oil Company, Marathon Intl Oil Co, Marathon Petro Norge to surreply to [12-1] motion to remand, filed. (fs) [Entry date 03/21/96] |
| 3/26/96 | 72 | SUPPLEMENT to Ruhrgas' [39-1] motion for reconsideration of [38-1] order denying motion for stay pending arbitration, and to its [64-1] response to pltfs' motion to remand, by Ruhrgas A G, filed. (fs) |
| 3/29/96 | 73 | MEMORANDUM AND ORDER denying [39-1] motion for reconsideration of [38-1] order denying motion for stay pending arbitration denying [39-2] motion to vacate and defer ruling pending discovery granting |

[4-1] motion to dismiss under Fed.R.Civ.P. 12(b)(2), (4) and (5) denying [12-1] motion to remand denying [8-1] motion to dismiss on forum non conveniens grounds, entered. Parties notified. (signed by Judge Melinda Harmon) (fs)

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| 3/29/96 | 74 | ORDER OF DISMISSAL: in accordance with the Court's Memorandum and Order of this day granting deft Rurhgas' motion to dismiss for lack of personal jurisdiction, the Court ORDERS this case be DISMISSED for lack of personal jurisdiction over deft Ruhrgas, and that Ruhrgas shall recover its costs of court., entered; Parties notified. (signed by Judge Melinda Harmon) (fs) |

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| 4/4/96 | 76 | NOTICE OF APPEAL of [74-1] order, [73-1] order by Marathon Oil Company, Marathon Intl Oil Co, Marathon Petro Norge, filed. Fee Status: paid Receipt #: 455725 (bpw) [Entry date 04/09/96] |

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| 4/17/96 | 78 | NOTICE OF APPEAL of [74-1] order, [38-1] order by Ruhrgas A G, filed. Fee Status: paid Receipt #: 456028 (bpw) [Entry date 04/19/96] |



GENERAL DOCKET FOR
Fifth Circuit Court of Appeals

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| 4/30/96 | Record on appeal filed. Volumes: 7 Exhibits: 2 Boxes – [96-20361, 96-20405] ROA ddl satisfied. [96-20361 96-20405] |

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| 6/13/96 | Appellant's Brief filed by Appellant-Cross-Appellee Marathon Oil Comp in 96-20361, Appellant-Cross-Appellee Marathon Intl Oil Co in 96-20361, Appellant-Cross-Appellee Marathon Petro Norge in 96-20361, Appellant-Cross-Appellee Marathon Oil Comp in 96-20405, Appellant-Cross-Appellee Marathon Intl Oil Co in 96-20405, Appellant-Cross-Appellee Marathon Petro Norge in 96-20405. Copies of brief: 7 # of pages: 40. Date of COS: 6/10/96 Sufficient [Y/N]: y, [96-20361, 96-20405] A/Pet's Brief ddl satisfied, XA/Pet Brief due on 7/15/96 for A G Ruhrgas in 96-20361, for A G Ruhrgas in 96-20405. [96-20361 96-20405] |

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| 7/10/96 | Cross Appellant's Brief filed by Appellee-Cross-Appellant A G Ruhrgas in 96-20361, Appellee-Cross-Appellant A G Ruhrgas in 96-20405. Copies of Brief: 7 # of pages: 40 Date of COS: 7/10/96 Sufficient [Y/N]: Y [96-20361, 96-20405] XA/Pet Brief ddl satisfied. XE/Res Brief due on 8/9/96 for Marathon Petro Norge in 96-20361, for Marathon Intl Oil Co in 96-20361, for Marathon Oil Comp in 96-20361, for Marathon Petro Norge in 96-20405, for Marathon Intl Oil Co in 96-20405, for Marathon Oil Comp in 96-20405. [96-20361 96-20405] |

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7/22/96 Motion filed by Federal Republic of Germany to file amicus brief [364201-1] Response/ Opposition due on 7/30/96 in 96-20361, in 96-20405. [96-20361, 96-20405] [96-20361 96-20405]

7/31/96 Response/opposition filed by Appellant-Cross-Appellee Marathon Oil Comp in 96-20361, Appellant-Cross-Appellee Marathon Intl Oil Co in 96-20361, Appellant-Cross-Appellee Marathon Petro Norge in 96-20361, Appellant-Cross-Appellee Marathon Oil Comp in 96-20405, Appellant-Cross-Appellee Marathon Intl Oil Co in 96-20405, Appellant-Cross-Appellee Marathon Petro Norge in 96-20405 to motion to file amicus brief [364201-1] Response/Opposition ddl satisfied. in 96-20361, motion to file amicus brief [364201-1] in 96-20405 [371835-1] [96-20361, 96-20405] [96-20361 96-20405]

8/2/96 COURT Order filed granting motion to file amicus brief [364201-1] in 96-20361, 96-20405 (JMD) Copies to all counsel. [96-20361, 96-20405] [96-20361 96-20405]

8/2/96 Amicus curiae brief filed by Amicus Curiae Fed Repub of Germany in 96-20361, Amicus Curiae Fed Repub of Germany in 96-20405. Copies of Brief: 8 # of pages: 10. Date of COS: 7/19/96 Sufficient [Y/N]: y. . [96-20361, 96-20405] XE/Res Brief ddl updated to 9/3/96 for Marathon Petro Norge in 96-20361, for Marathon Intl Oil Co in 96-20361, for Marathon Oil Comp in 96-20361, for Marathon Petro Norge in 96-20405, for Marathon Intl Oil Co in 96-20405, for Marathon Oil Comp in 96-20405. [96-20361 96-20405]



9/6/96 Cross Appellee's Brief filed by Appellant-Cross-Appellee Marathon Oil Comp in 96-20361, Appellant-Cross-Appellee Marathon Intl Oil Co in 96-20361, Appellant-Cross-Appellee Marathon Petro Norge in 96-20361, Appellant-Cross-Appellee Marathon Oil Comp in 96-20405, Appellant-Cross-Appellee Marathon Intl Oil Co in 96-20405, Appellant-Cross-Appellee Marathon Petro Norge in 96-20405. Copies of Brief: 7 # of pages: 38. Date of COS: 9/3/96 Sufficient [Y/N]: y. [96-20361, 96-20405] XE/Res brief ddl satisfied. XA/Pet Reply Brief due on 9/20/96 for A G Ruhrgas in 96-20361, for A G Ruhrgas in 96-20405. [96-20361 96-20405]

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9/19/96 Cross Appellant's Reply Brief filed by Appellee-Cross-Appellant A G Ruhrgas in 96-20361, Appellee-Cross-Appellant A G Ruhrgas in 96-20405. Copies of Brief: 7 # of pages: 15 Date of COS: 9/18/96. Sufficient [Y/N]: y. [96-20361, 96-20405] XA/Pet Reply Brief ddl satisfied. [96-20361 96-20405]

* * *

12/4/96 Oral argument heard. Case argued by Clifton T Hutchinson for Appellant-Cross-Appellee Marathon Petro Norge, Appellant-Cross-Appellee Marathon Intl Oil Co, Appellant-Cross-Appellee Marathon Oil Comp in 96-20361, David John Schenck for Appellant-Cross-Appellee Marathon Petro Norge, Appellant-Cross-Appellee Marathon Intl Oil Co, Appellant-Cross-Appellee Marathon Oil Comp in 96-20361, Ben H Sheppard for Appellee-Cross-Appellant A G Ruhrgas in

96-20361, Guy Stanford Lipe for Appellee-Cross-Appellant A G Ruhrgas in 96-20361, J Gregory Taylor for Appellant-Cross-Appellee Marathon Petro Norge, Appellant-Cross-Appellee Marathon Intl Oil Co, Appellant-Cross-Appellee Marathon Oil Comp in 96-20405, David John Schenck for Appellant-Cross-Appellee Marathon Petro Norge, Appellant-Cross-Appellee Marathon Intl Oil Co, Appellant-Cross-Appellee Marathon Oil Comp in 96-20405, Ben H Sheppard for Appellee-Cross-Appellant A G Ruhrgas in 96-20405, Guy Stanford Lipe for Appellee-Cross-Appellant A G Ruhrgas in 96-20405 [96-20361, 96-20405] [96-20361 96-20405]

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6/10/97 Opinion filed. Issd in T form? y Issue Mandate due on 7/1/97 in 96-20361, in 96-20405. [96-20361, 96-20405] [96-20361 96-20405]

6/10/97 Judgment entered and filed. [96-20361, 96-20405] [96-20361 96-20405]

* * *

11/17/97 COURT Order filed for rehearing en banc, on the court's own motion, [789770-1] with Argument (Y/N)? y Before: All Active Judges A/Pet Supplemental Brief due on 12/18/97 for Marathon Oil Comp in 96-20361, for Marathon Intl Oil Co in 96-20361, for Marathon Petro Norge in 96-20361, for Marathon Oil Comp in 96-20405, for Marathon Intl Oil Co in 96-20405, for Marathon Petro Norge in 96-20405. E/Res Supplemental Brief due on 1/20/98 for A G Ruhrgas in 96-20361, for



A G Ruhrgas in 96-20405. ( ) Copies to all counsel. [96-20361, 96-20405] [96-20361 96-20405]

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12/22/97 Supplemental brief filed by Appellant-Cross-Appellee Marathon Petro Norge in 96-20361, Appellant-Cross-Appellee Marathon Intl Oil Co in 96-20361, Appellant-Cross-Appellee Marathon Oil Comp in 96-20361, Appellant-Cross-Appellee Marathon Petro Norge in 96-20405, Appellant-Cross-Appellee Marathon Intl Oil Co in 96-20405, Appellant-Cross-Appellee Marathon Oil Comp in 96-20405. Copies of Brief: 20 # of pages: 35. Date of COS: 12/18/97 [96-20361, 96-20405] A/Pet Supplemental Brief ddl satisfied. [96-20361 96-20405]

* * *

1/20/98 Supplemental brief filed by Appellee-Cross-Appellant A G Ruhrgas in 96-20361, Appellee-Cross-Appellant A G Ruhrgas in 96-20405 Copies of Brief: 20 # of pages: 39. Date of COS: 1/20/98 [96-20361, 96-20405] E/Res Supplemental Brief ddl satisfied. [96-20361 96-20405]

* * *

2/4/98 Motion filed by Certain Insurer Defendants in Louisiana Tobacco Litigation to file amicus brief [854183-1] [96-20361, 96-20405] [96-20361 96-20405]

2/4/98 Motion filed by Law Professors Concerned with International Arbitration to file amicus brief [854217-1] [96-20361, 96-20405] [96-20361 96-20405]

2/4/98 Motion filed by International Group of P&I Clubs to file amicus brief [854539-1] [96-20361, 96-20405] [96-20361 96-20405]

2/4/98 Motion filed by Reinsurance Association of America to file amicus brief [859285-1] [96-20361, 96-20405] [96-20361 96-20405]

* * *

2/9/98 Amicus curiae brief filed by Amicus Curiae Intl Grp of P&I in 96-20361, Amicus Curiae Intl Grp of P&I in 96-20405. Copies of Brief: 20 # of pages: 17. Date of COS: 2/4/98 Sufficient [Y/N]: y. [96-20361, 96-20405] [96-20361 96-20405]

* * *

2/17/98 Amicus curiae brief filed by Amicus Curiae Certain Insr in 96-20361, Amicus Curiae Certain Insr in 96-20405. Copies of Brief: 20 # of pages: 16. Date of COS: 2/12/98 Sufficient [Y/N]: y. [96-20361, 96-20405] [96-20361 96-20405]

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2/17/98 Amicus curiae brief filed by Amicus Curiae Reinsurance Assoc in 96-20361, Amicus Curiae Reinsurance Assoc in 96-20405. Copies of Brief: 20 # of pages: 11. Date of COS: 2/4/98 Sufficient [Y/N]: y. [96-20361, 96-20405] [96-20361 96-20405]

* * *

2/26/98 Amicus curiae brief filed by Amicus Curiae Law Professors in 96-20361, Amicus Curiae Law Professors in 96-20405. Copies of Brief: 20 # of pages: 18. Sufficient [Y/N]: n. no COS. [96-20361, 96-20405] Sufficient Brief



due on 3/9/98 for Law Professors in 96-20361, for Law Professors in 96-20405. [96-20361 96-20405]

* * *

5/18/98 Oral argument heard En Banc. Case argued by David John Schenck for Appellant-Cross-Appellee Marathon Oil Comp, Appellant-Cross-Appellee Marathon Intl Oil Co, Appellant-Cross-Appellee Marathon Petro Norge in 96-20361, J Gregory Taylor for Appellant-Cross-Appellee Marathon Oil Comp, Appellant-Cross-Appellee Marathon Intl Oil Co, Appellant-Cross-Appellee Marathon Petro Norge in 96-20361, Ben H Sheppard for Appellee-Cross-Appellant A G Ruhrgas in 96-20361, David John Schenck for Appellant-Cross-Appellee Marathon Oil Comp, Appellant-Cross-Appellee Marathon Intl Oil Co, Appellant-Cross-Appellee Marathon Petro Norge in 96-20405, J Gregory Taylor for Appellant-Cross-Appellee Marathon Oil Comp, Appellant-Cross-Appellee Marathon Intl Oil Co, Appellant-Cross-Appellee Marathon Petro Norge in 96-20405, Ben H Sheppard for Appellee-Cross-Appellant A G Ruhrgas in 96-20405. [96-20361, 96-20405] [96-20361 96-20405]

5/18/98 CLERK Order filed denying motion for reconsideration to file amicus brief of "Certain Insurer Defendants" [861243-1] in 96-20361, 96-20405, denying motion for reconsideration to file amicus brief of "Certain Insurer Defendants" [861243-1] in 96-20361, 96-20405 Copies to all counsel. The

motion of the "Certain Insurer Defendants in Louisiana Tobacco Litigation" to file a brief as amicus curiae is DENIED and their brief stricken. [96-20361, 96-20405] [96-20361 96-20405]

* * *

6/22/98 Opinion filed, Issd in T form? y Issue Mandate due on 7/13/98 in 96-20361, in 96-20405. [96-20361, 96-20405] [96-20361 96-20405]

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No. 95-32957

| | | |
|---|---|---|
| MARATHON OIL COMPANY, MARATHON INTERNATIONAL OIL COMPANY, and MARATHON PETROLEUM NORGE A/S | § | IN THE DISTRICT COURT |
| | § | OF HARRIS COUNTY, TEXAS |
| | § | 152d JUDICIAL DISTRICT |
| Plaintiffs, | § | |
| v. | § | |
| RUHRGAS, A.G. | § | |
| Defendant. | § | |

## PLAINTIFFS' FIRST AMENDED PETITION

Plaintiffs Marathon Oil Company, Marathon International Oil Company, and Marathon Petroleum Norge A/S (collectively "Plaintiffs" or "Marathon") assert the following claims against Ruhrgas, A.G.

### PARTIES

1. Marathon Oil Company is an Ohio corporation that maintains its principal office at 5555 San Felipe, Houston, Harris County, Texas 77056.

2. Marathon International Oil Company is a Delaware corporation that maintains its principal place of business at 5555 San Felipe, Houston, Harris County, Texas 77056.

3. Marathon Petroleum Norge A/S ("MPN") is a Norwegian corporation that maintains its principal office at 5555 San Felipe, Houston, Harris County, Texas 77056.

4. Defendant Ruhrgas, A.G. ("Ruhrgas") is a German corporation that maintains its principal office at Huttropstr. 60, 45138 Essen, Germany. Among other connections to Texas, Ruhrgas owns a 20% interest in Texas-based Tenneco Oil Company. This defendant has done business in the State of Texas within the meaning of § 17.042 of the Texas Civil Practice and Remedies Code, out of which a portion of this suit arises, but has not designated an agent upon which service of process may be made. Pursuant to the Hague Convention, Ruhrgas may be served by delivering two copies of this petition translated into German, to Der Justizminister des Landos Nordrhein-Westfalen, D 4000 Duesseldorf, Germany. The Minister of Justice then will forward this petition to Ruhrgas. Alternatively, Ruhrgas may be served in accordance with Texas Civil Practice & Remedies Code § 17.041, *et seq.*, which deems the Secretary of State to be Ruhrgas's agent.

## VENUE

5. Venue is proper in Harris County pursuant to Tex. Civ. Prac. & Rem. Code § 15.007 because the defendant is a foreign corporation with no agent or representative in this state, and certain of the plaintiffs reside in Harris County. Furthermore, some of the causes of action alleged in this petition arose, in whole or in part, in Houston, Harris County, Texas.

## FACTUAL BACKGROUND

6. This case arises out of a conspiracy among Ruhrgas, Den Norske Stats Oljeselskap A.S. ("Statoil"), and others to monopolize the Western European market for natural gas. Pursuant to this conspiracy, Ruhrgas participated in a series of interconnected wrongful



acts relating to the solicitation for funding, development and subsequent operation of gas fields in the North Sea off the coast of Norway. The wrongful conduct alleged in this petition has been continuing for many years, has caused continuing injury to Plaintiffs, and still is ongoing. Plaintiffs are seeking to recover the damages they have sustained over the years as a proximate result of Ruhrgas' continuing torts.

### History of Gas Development in the North Sea

7. In order to appreciate the nature and extent of Ruhrgas' wrongful conduct, one first must understand the historical factors leading up to the development of gas in the North Sea. From the mid 1960's to the early 1970's, the largest source of natural gas for the Western European market was the Groningen field in Holland. Between 1965 and 1974, this field serviced a steadily growing demand for natural gas in Holland, France, Belgium and West Germany. By 1975, however, Gasunie (the Dutch state-owned gas company) had determined that the Groningen field would be insufficient to meet Holland's future needs if gas exports continued. As a result, Gasunie began to phase out its natural gas exports, leaving gas buyers in Western Europe scrambling to find a stable new source of high-quality gas.

8. Although both the Soviet Union and Algeria had gas in exportable quantities, many Western European buyers did not consider these sources stable enough for long-term dependence due to the political climates in those countries. Instead, the most promising source for Western Europe's long term natural gas needs were gas reserves located beneath the North Sea. Most of these reserves had not, however, been commercially developed as of the mid-1970's,

and were located so far from any coastline that development and transportation would be expensive, if not prohibitive.

9. Ownership of the North Sea gas reserves was divided between Norway and Great Britain by treaty. By the early 1970's, Great Britain already was producing some North Sea gas for its own domestic consumption, as was Norway to a lesser extent. Norway's natural gas operations were conducted by Statoil, Norway's state owned oil and gas company.

10. Statoil saw the Western European gas demand as creating a potential bonanza for itself. If Statoil could develop the North Sea fields and locate a long-term, reliable purchaser for large amounts of gas, Statoil could become Western Europe's primary gas supplier and reap tremendous profits for years to come.

**Ruhrgas' Conspiracy with Statoil**

11. Ruhrgas is Germany's largest gas company, controlling more than 80% of the German market for natural gas. In the 1970's, Ruhrgas, along with several other gas buyers, formed a cartel known as the "Consortium" or the "Grand Alliance." The goal of this Ruhrgas-led Consortium was to divide up the European gas market among themselves and control the distribution of gas throughout the European continent. Once Gasunie began decreasing its exports of natural gas, Ruhrgas and its Consortium immediately turned to Statoil as a potential supplier.

12. Following a series of closed door meetings and negotiations, Statoil agreed to sell the vast majority of its North Sea gas to Ruhrgas and its Consortium, and the parties jointly launched a plan to monopolize the Western European gas market. Pursuant to



this plan, the few Norwegian North Sea gas fields then in operation were to be linked by a pipeline known as "Norpipe" to a gas facility owned by Ruhrgas in Emden, Germany. Thus Ruhrgas would be able to control the distribution of all gas then being produced in the southern portion of the North Sea.

13. Both Ruhrgas and Statoil knew that the few fields producing North Sea gas in the mid-1970's never would provide enough gas to satisfy the Western European market. In order to monopolize that market, Ruhrgas and Statoil would have to ensure a stable supply of gas for years to come by tapping into potentially large but still undeveloped gas reserves further north. For Ruhrgas' and Statoil's plan to succeed, platforms to exploit such reserves would have to be funded and developed, and a new pipeline would have to be constructed to connect the new fields to the Norpipe system (and thus to Europe through Ruhrgas' facility in Emden). Unfortunately, developing gas fields in the North Sea is an incredibly expensive proposition. Thus, the conspirators sought to interest other companies, including Marathon, in sharing the costs associated with developing the northern fields, building platforms, and constructing a gas pipeline system to transport the gas to Emden.

**The Development of Heimdal**

14. One of the undeveloped North Sea fields was the Heimdal gas field. In 1972, Pan Ocean Oil, Ltd. had discovered the Heimdal gas field in Norway's portion of the North Sea. The Heimdal field was declared commercial in 1974, roughly the same time that Gasunie informed its Western European gas buyers that they would have to look elsewhere for

natural gas. At the time, Pan Ocean planned to connect the Heimdal field (which had only marginal gas reserves) to a neighboring field via a short pipeline, and then ship the gas to Great Britain through an existing pipeline. In 1975 Statoil exercised an option to take a 40% equity interest in Heimdal and entered into an Operating Agreement with, *inter alia*, Pan Ocean Oil Norge A/S, Pan Ocean's Norwegian subsidiary, to develop the field.

15. Marathon acquired Pan Ocean in 1976, and with it a 24% interest in the field. Marathon's acquisition made in Heimdal's second-largest equity interest holder and a joint venture partner with Statoil. Marathon also acquired Pan Ocean Oil Norge A/S, which held the license to Heimdal, and subsequently renamed the company Marathon Petroleum Norge A/S.

16. In the late 1970's and early 1980's, Statoil and Ruhrgas were seeking to obtain control of the sale and distribution of gas from three North Sea fields: Heimdal, Gulffaks and Statfjord. Only with all three fields committed, and with the financial commitment of the licensees of each (including MPN), could enough money be raised to build a pipeline to link these northern regions (and other potential Norwegian reserves even further north) to Ruhrgas' Emden facility. Thus Ruhrgas and Statoil plotted to obtain a commitment from Marathon, and others to commit the funds necessary to enable them to effect their monopolistic scheme.

17. Shortly after MPN became a venture partner, Statoil suggested that Heimdal be connected to the European continent rather than to Great Britain. Such a connection would require the construction of a new and longer pipeline (later called "Statpipe") to connect Heimdal to the existing Norpipe system, which



conveniently landed at Ruhrgas' facility In Emden. Statoil proposed that the cost of constructing such a pipeline be recouped from the joint venturers by means of a high transportation charge or "tariff" on all gas flowing through the pipeline until the construction costs were recovered.

18. Naturally, Plaintiffs were concerned about bearing such a cost (particularly given that a pipeline to Britain would have been cheaper), but Statoil assured Marathon that the venture partners would be able to charge a premium price for Heimdal gas that would be more than sufficient to offset the tariff costs. Such a premium price was essential – given the high costs associated with developing the Heimdal field, and the relatively small amount of gas in the field, only a premium price would provide an adequate return on investment sufficient to justify the cost of development.

19. In order to convince Plaintiffs and the Heimdal joint venture partners that they would be assured of obtaining the required premium price, Statoil began "negotiating" with potential gas buyers before any substantial funds were committed to develop the field. Of course, Statoil's talks centered primarily, if not exclusively, on Ruhrgas and the Consortium. Ruhrgas and its Consortium agreed to pay the Heimdal venturers a premium price if the field were developed and connected to the Norpipe system. Indeed, Ruhrgas and the Consortium even signed a "Heads of Agreement" promising to pay the venturers a formula then yielding $5.50 per million BTU's ($6.16/mcf) for Heimdal gas. Such a price would have provided the venturers with a sufficient premium to economically develop the field and pay the Statpipe tariff. Based on these oral and written

assurances, Marathon agreed to provide their subsidiaries and affiliates with sufficient capital to enable them to fund the development of the Heimdal field and to support the proposed Statpipe pipeline.

**Ruhrgas' and Statoil's Secret Agreements**

20. During the negotiations leading up to Ruhrgas' representations and agreements to purchase gas at a premium price, Statoil and Ruhrgas representatives conducted several secret meetings. Upon information and belief, Statoil and Ruhrgas agreed that Statoil would force the Heimdal venturers to sell the gas to Ruhrgas and the Consortium through a pipeline to be connected to Ruhrgas' facility at Emden. The Heimdal venturers would be "locked" into the Ruhrgas pipeline system with no other means of selling their gas. Marathon, of course, never was told of this secret agreement.

21. Based on Ruhrgas' representations and agreements, Marathon advanced over $300 million to their subsidiaries and affiliates for the development of the Heimdal field. Statoil and Ruhrgas never disclosed to Plaintiffs: (a) that they were attempting to monopolize the Western European gas market and prevent sales to any other gas buyers; (b) that connecting Heimdal to Europe (instead of Great Britain) through Ruhrgas' Emden facility was part of their overall monopolistic plan; or (c) that Ruhrgas never intended to pay the promised premium price for gas. Had Marathon been told of these facts, Marathon never would have advanced any funds for the development of the Heimdal field and the support of Statpipe, and MPN could have recovered its capital investment in the Heimdal license.



22. Also unbeknownst to Plaintiffs was the fact that Statoil had discovered a huge gas reserve north of Heimdal that ultimately became known as the Troll field. The Troll field was forty times larger than Heimdal, and had the potential of providing Statoil and Ruhrgas with the gas necessary to permit them to realize their goal of monopolizing the Western European gas market.

**Ruhrgas Uses Coercion to Lower Gas Prices**

23. After discovering the Troll field, Statoil began negotiating a gas sales contract with Ruhrgas and the Consortium to cover the new gas. Statoil was anxious to obtain a long-term commitment for the sale of Troll gas. Ruhrgas, in turn, wished to (1) lower *all* North Sea gas prices to boost its monopoly profits, and (2) obtain the rights to all Norwegian reserves for the Consortium to assure a stable supply for its monopoly for many years to come. In secret negotiations these conspirators reached an agreement to commit Troll gas to Ruhrgas at a much reduced price (initially around $2.201 per mcf), and Ruhrgas induced Statoil to commit to lowering North Sea gas prices at all other Norwegian fields, including Heimdal. Statoil made its decision to lower all North Sea gas prices for Ruhrgas' benefit despite the fact that Marathon and others had made, and were continuing to make, enormous investments in developing the Heimdal field based on the assurance of premium prices.

24. Following Statoil's secret agreement to lower all North Sea gas prices to the Troll level, Ruhrgas immediately demanded that all Heimdal licensees lower their gas prices because the Troll price allegedly had set the market price for North Sea gas. When Marathon's affiliate refused to lower the gas

price from the agreed-upon premium amount, Ruhrgas and the other Consortium members simply continued taking Heimdal gas from Ruhrgas' Emden facility but began paying less for it.

25. By the time Ruhrgas and the other Consortium members began these wrongful acts, Marathon was trapped. The Heimdal gas reserves (and any hope of recovering on the loans and the value of the license) were locked into a single pipeline that transported its gas to a facility completely controlled by Ruhrgas. When the possibility of securing non-Consortium buyers was raised in light of Ruhrgas' flagrant wrongful conduct, Ruhrgas advised that it would not allow any such purchasers to access Heimdal gas. In other words. Marathon's affiliate was forced to choose between selling its gas to Ruhrgas at a loss, or not selling its gas at all.

26. In response to the breach of the gas sales agreement by Ruhrgas and the Consortium, the Marathon affiliate that had entered into the contract with the Consortium initiated arbitration. The arbitration resulted in a finding that Ruhrgas and most Consortium members were obligated to pay the proper and agreed-upon contract price for the Heimdal gas.

27. The arbitration was not a total victory, however: another Consortium member (Distrigaz, the Belgian state gas company) was excused from performing under its contracts, leaving Plaintiffs without a buyer for approximately 15% of the gas. Thus, although initially victorious over Ruhrgas, the net result from arbitration still left Marathon's affiliates operating at a substantial loss. Furthermore, Ruhrgas expressly advised that it would not permit the Distrigaz volumes to be sold to any competitor of the Consortium.



28. Ruhrgas appealed the arbitration award and indicated that it would seek relief under a "hardship" clause of its gas sales contract because the Troll price allegedly had lowered the market value for North Sea gas. (In other words, through its conspiracy with Statoil, Ruhrgas effectively had lowered the market price for all North Sea gas. It then claimed that it suffered a hardship (and would lose money) by having to pay more than this new "market" price.).

29. Given Ruhrgas' threats and its obvious ability to control the sale of all of the gas from Marathon's license, Marathon and its affiliates were left with no choice but to accede to Ruhrgas' demands. Faced with this economic coercion from Ruhrgas acting from its controlling positions in the Western European gas market, Marathon's affiliate agreed to an amendment of the gas sales contracts that provided for a reduction in the sales price over a period of time beginning in 1992 that ultimately would reach the Troll price level. The negotiations leading up to this agreement, along with the economic coercion described above, took place in Houston, Harris County, Texas.

**Statoil's Representations Induced Marathon Into Not Filing Suit**

30. In the course of the negotiation with Ruhrgas and the Consortium, Marathon considered further litigation against Ruhrgas to recover the damages up to that point. Statoil, however, assured Marathon that once the Troll field was in production and its gas was flowing through Statpipe, tariff prices would decline and thereby assuring Marathon that its investment would improve. Statoil provided projections indicating that Troll would be connected to Statpipe, that gas volumes flowing through Statpipe

necessarily would increase, and that the tariff on all gas flowing through the pipeline correspondingly would decrease. These projections were sent to Marathon in Houston, Texas. Based on Statoil's assurances, Marathon refrained from further litigation with Ruhrgas.

31. Unfortunately, Statoil only told Marathon half of the story. Upon information and belief, Statoil and Ruhrgas had not agreed to ship the Troll volumes through Statpipe. In fact, Statoil had determined to ship gas from its newer gas fields through a separate pipeline system bypassing Statpipe. Thus Statoil either negligently misrepresented or fraudulently represented to Marathon that this gas would be available to lower the Statpipe tariff.

32. Statoil continued to send projections to Marathon in Houston, Texas for several years that indicated the Troll field would be connected to Statpipe and that tariffs then would decrease. Earlier this year, however, Statoil announced for the first time that Troll would *not* be connected to Statpipe – instead, its gas would be transported to Europe through a new pipeline. Thus Statoil and Ruhrgas have left Marathon and its affiliates to continue incurring debilitating losses without any reduction in expenses as promised. Had Statoil not made misrepresentations to Marathon regarding increased shipments of gas through Statpipe and the related cost reductions, Plaintiffs would have filed this action years ago.

**Plaintiffs' Damages**

33. As a result of these wrongful activities, Marathon have suffered, and continue to suffer, tremendous losses. Furthermore, given that Marathon now will be unable to repay any of the advances Ruhrgas induced Marathon to make to develop the Heimdal



field and support Statpipe, Marathon will suffer and recognize a loss of its capital investment this year. To add insult to injury, Statoil has attempted to take advantage of its wrongful acts and conspiratorial activities by offering to purchase MPN's license in Heimdal for a nominal price and thus freeze Plaintiffs out of the field they helped develop. The result of Ruhrgas' wrongful acts is to render MPN's license virtually worthless.

34. Ruhrgas' and Statoil's actions as alleged above were (and are) part of a single ongoing plan aimed at controlling the Western European gas market and duping others into funding the development of North Sea gas fields and pipeline systems for Statoil's and Ruhrgas' benefit. The wrongful activities of Ruhrgas and Statoil have been continuing for years, and continue to effect additional injury to Plaintiffs every day: in addition to the staggering loss of the initial investment, Plaintiffs are incurring substantial losses each month on the Heimdal operations.

35. Both Statoil and Ruhrgas fraudulently concealed their secret agreements from Marathon. Had Plaintiffs known the truth about Ruhrgas' and Statoil's relationship and plans, they never would have agreed (1) to commit hundreds of millions of dollars to develop the Heimdal field, and (2) to support a pipeline to Europe that landed in a facility controlled by Ruhrgas.

## CAUSES OF ACTION

### FRAUD

36. Plaintiffs reallege the allegations contained in the preceding paragraphs, and incorporate them by reference.

37. As part of its continuing tortious activity, Ruhrgas made numerous material misrepresentations to Marathon. Among other things, Ruhrgas represented to Marathon that it would pay a premium price for Heimdal gas in exchange for (a) Marathon's agreement to fund the development of the Heimdal gas reserves; (b) Marathon's support for connecting Heimdal to Ruhrgas' facility in Emden; and (c) Marathon's agreement to help underwrite the construction costs for Statpipe.

38. Ruhrgas never intended to honor its promises to pay a premium price for Heimdal gas. To the contrary, Ruhrgas merely promised to pay such prices to induce Marathon to fund the development of the field and the construction of a pipeline to Emden. Ruhrgas always intended to pay a lower price once the pipeline was constructed and there was then no other avenue for selling the gas.

39. Ruhrgas intended that Plaintiffs would act upon these misrepresentations by advancing the funds necessary to develop Heimdal, and Plaintiffs justifiably relied upon such misrepresentations to their detriment. Had Ruhrgas not made these misrepresentations, Plaintiffs never would have advanced any funds for the Heimdal field's development.

40. As a proximate result of Ruhrgas' fraud, Plaintiffs sustained actual damages in an amount far in excess of this Court's jurisdictional limits, for which Plaintiffs now sue.

41. Ruhrgas' actions as alleged above were willful, knowing, intentional, outrageous and malicious. Given the surrounding circumstances, Ruhrgas either intended, or should have known, that its conduct created an extreme degree of risk and peril to Plaintiffs, a high probability of serious injury to Plaintiffs, and a genuine likelihood of financial



catastrophe for Plaintiffs. Accordingly, Plaintiffs also sue for punitive damages in an amount of at least four times their actual damages.

## TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONSHIPS

42. Plaintiffs reallege the allegations contained in the preceding paragraphs, and incorporate them by reference.

43. From the inception of the Heimdal field's development, and particularly after Ruhrgas demanded a price renegotiation, Marathon's affiliate sought to identify and establish relationships with European gas buyers other than Ruhrgas and the Ruhrgas-led Consortium.

44. In response, Ruhrgas representatives told Marathon that Ruhrgas would not allow the Heimdal gas to be transported through its facilities to any competing gas buyer.

45. Ruhrgas has made good on its threat. To date, it has refused to permit non-Consortium buyers to access the gas originally allocated to the Consortium under the gas sales agreements. This interference has been continuous and still is on-going. For example, Ruhrgas now is refusing to recognize the termination of the gas sales contract between the parties, and its refusing to provide certain necessary gas transportation cost information to enable a sale to other buyers.

46. Marathon's affiliate had (and has) a reasonable probability of entering into business relationships with other gas buyers. Ruhrgas maliciously and intentionally prevented (and still is preventing) those relationships from occurring. Ruhrgas' purpose in interfering with these prospective relationships is to

harm Plaintiffs, and Ruhrgas is not privileged or justified in such interference.

47. As a proximate result of Ruhrgas' tortious interference as alleged above, Plaintiffs have sustained, and continue to sustain, actual damages in an amount far in excess of this Court's jurisdictional limits, for which they now sue.

48. Ruhrgas' actions as alleged above were willful, knowing, intentional, outrageous and malicious. Given the surrounding circumstances, Ruhrgas either intended, or should have know, that its conduct created an extreme degree of risk and peril to Plaintiffs, a high probability of serious injury to Plaintiffs, and a genuine likelihood of financial catastrophe for Plaintiffs. Accordingly, Plaintiffs also sue for punitive damages in an amount of at least four times their actual damages.

**PARTICIPATION IN BREACH OF FIDUCIARY DUTY**

49. Plaintiffs reallege the allegations contained in the preceding paragraphs, and incorporate them by reference.

50. As alleged above, Statoil and MPN are joint venture partners. This relationship gives rise to formal fiduciary duties owed by Statoil to MPN.

51. As a result of its relationship with Statoil, MPN trusted and relied on Statoil, and was justified in placing confidence in the belief that Statoil would act in MPN's best interest. Accordingly, MPN's relationship with Statoil was a confidential and special relationship, as well a formal fiduciary relationship.

52. Among other things, Statoil owed MPN a duty to fully disclose all material facts, a duty not to seek an advantage for itself at MPN's expense, a duty of



loyalty, and a duty of good faith and fair dealing. Statoil's breaches of fiduciary duties to MPN have been continuous, and have caused MPN continuous injury. Examples of steps taken by Statoil include, among other things:

a) agreeing to lower all North Sea gas prices to assist Ruhrgas, contrary to the promises it had made to Plaintiffs and to Plaintiffs' detriment;

b) conspiring with Ruhrgas to monopolize the market for North Sea gas to Plaintiffs' detriment;

c) providing projections showing that Troll gas would flow through Statpipe when Statoil knew, or should have known, that those projections were erroneous; and

d) failing to disclose its agreements with Ruhrgas that necessarily worked to Plaintiffs' detriment.

53. Ruhrgas was aware that Statoil and MPN were joint venturers, and that Statoil owed fiduciary duties to MPN. Nevertheless, Ruhrgas knowingly aided, abetted, induced, and/or participated in the breach of Statoil's fiduciary duties as alleged above. Accordingly, Ruhrgas is jointly and severally liable for any damages Plaintiffs sustained as a result of Statoil's breaches of fiduciary duty.

54. As a proximate result of Statoil's breaches of its fiduciary duties, and Ruhrgas' participation in those breaches, Plaintiffs sustained actual damages in an amount far in excess of this Court's jurisdictional limits, for which Plaintiffs now sue.

55 Ruhrgas' actions as alleged above were willful, knowing, intentional, outrageous and malicious. Given the surrounding circumstances, Ruhrgas either intended, or should have known, that its conduct created an extreme degree of risk and peril to

Plaintiffs, a high probability of serious injury to Plaintiffs, and a genuine likelihood of financial catastrophe for Plaintiffs. Accordingly, Plaintiffs also sue for punitive damages in an amount of at least four times its actual damages.

## CONSTRUCTIVE FRAUD

56. Plaintiffs reallege the allegations contained in the preceding paragraphs, and incorporate them by reference.

57. Ruhrgas' participation in Statoil's breaches of fiduciary duties constitutes the breach of both legal and equitable duties owed to Plaintiffs. Such breaches are constructively "fraudulent" because of their tendency to deceive others, violate confidence, and injure public interests.

58. As a proximate result of Ruhrgas' constructive fraud, Plaintiffs have sustained actual damages in an amount far in excess of this Court's jurisdictional limits, for which they now sue.

## CIVIL CONSPIRACY

59. Plaintiffs reallege the allegations contained in the preceding paragraphs, and incorporate them by reference.

60. Ruhrgas and Statoil conspired between themselves and with others to (i) fraudulently induce Marathon to fund the development of the Heimdal field, (ii) lower North Sea gas prices generally, and then (iii) force Marathon to accede to such prices, by means of misrepresentations, improper threats, breaches of fiduciary duty, and fraud. This plan was accomplished through the fraud, breaches of fiduciary



duties, and other actions alleged above. This conspiracy was designed to result in:

a) Marathon committing over $300 million to develop the Heimdal gas field and subsidize a European pipeline;

b) Statoil having a guaranteed long-term buyer for gas produced in its Troll field;

c) Ruhrgas and Statoil controlling the price and distribution of Heimdal gas;

d) Ruhrgas being able to purchase gas from all North Sea fields at lower prices than provided in its contracts;

e) Ruhrgas and Statoil effectively controlling the flow of gas from major North Sea fields and monopolizing the sale of North Sea gas in Western Europe;

f) Statoil using Plaintiffs and other gas producers to fund the construction of an undersea pipeline to Europe (for Statoil's and Ruhrgas' benefit) through excessive tariffs;

g) Ruhrgas and Statoil attempting to prevent, restrict or distort competition by, among other things, directly or indirectly fixing prices, and limiting or controlling markets; and

h) Ruhrgas and Statoil abusing a dominant position within the market.

61. Ruhrgas and Statoil conspired among themselves and others to accomplish both (a) unlawful purposes and (b) lawful purposes through unlawful means as alleged above. Both Ruhrgas and Statoil have committed, and continue to commit, numerous overt acts in furtherance of this conspiracy, including the breaches of fiduciary duties and misrepresentations

previously alleged. Accordingly, Ruhrgas is jointly and severally liable for all damages sustained by Plaintiffs due to this civil conspiracy.

62. As a proximate result of Ruhrgas' and Statoil's civil conspiracy, Plaintiffs have sustained actual damages in an amount far in excess of this Court's jurisdictional limits, for which they now sue.

63. Ruhrgas' actions as alleged above were willful, knowing, intentional, outrageous and malicious. Given the surrounding circumstances, Ruhrgas either intended, or should have known, that its conduct created an extreme degree of risk and peril to Plaintiffs, a high probability of serious injury to Plaintiffs, and a genuine likelihood of financial catastrophe for Plaintiffs. Accordingly, Plaintiffs also sue for punitive damages in an amount of at least four times their actual damages.

**JURY DEMAND**

64. Plaintiffs request that this matter be decided by trial to jury, and hereby tender the required jury fee.

**WHEREFORE PREMISES CONSIDERED,** Plaintiffs pray that this matter be placed on the Court's jury docket, and that after a trial on the merits, the Court enter judgment awarding Plaintiffs:

(1) Actual damages;

(2) Punitive damages of not less than four times actual damages;

(3) Prejudgment and post-judgment interest allowed by law;

(4) Costs of Court; and



(5) Such other and further relief as to which Plaintiffs are entitled.

Respectfully submitted,

/s/ Clifton T. Hutchinson
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**ATTORNEYS FOR PLAINTIFFS MARATHON OIL COMPANY, MARATHON INTERNATIONAL OIL COMPANY, AND MARATHON PETROLEUM NORGE A/S**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| MARATHON OIL COMPANY, MARATHON INTERNATIONAL OIL COMPANY, and MARATHON PETROLEUM NORGE A/S, | § | CIVIL ACTION NO. H-95-4176 |
| Plaintiffs, | § | |
| VS. | § | |
| RUHRGAS, A.G., | § | |
| Defendant. | § | |

NOTICE OF REMOVAL

(Filed Aug. 21, 1995)

TO THE UNITED STATES DISTRICT COURT:

Defendant Ruhrgas AG, expressly reserving all of its rights to respond to this lawsuit, including objections to lack of personal jurisdiction and improper service on a foreign defendant, submits this Notice of Removal of the above-styled matter pursuant to the provisions of 28 U.S.C. §§ 1331 and 1332(a)(2), 9 U.S.C. §§ 203 and 205, and 28 U.S.C. § 1441, and in support thereof would show as follows:

1. The above-styled action was filed by Plaintiffs against Defendant in the 152nd Judicial District Court of Harris County, Texas, and is pending in that court under



Cause No. 95-32957. True and correct copies of all executed process, pleadings asserting causes of action, orders signed by the state judge, and the docket sheet that are on file with the 152nd Judicial District Court of Harris County, Texas, are attached as Exhibit "A" and incorporated by reference for all purposes. This Notice of Removal is also based upon the Declaration of Lutz K. Eckert and referenced Exhibits, which are attached as Exhibit "B" and incorporated by reference for all purposes.

2. In this case, Plaintiffs attempt to recover damages in tort arising out of an agreement for the sale of natural gas produced in the Norwegian North Sea between Ruhrgas AG and Marathon Petroleum Company (Norway) ("MPCN"), an affiliate of the Plaintiffs, even though (1) MPCN is not a plaintiff, and (2) the agreement provides for mandatory arbitration.

3. This action is removable under 9 U.S.C. § 205 because the subject matter of this action relates to an arbitration agreement falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, reprinted at the note following 9 U.S.C. § 201 ("the Convention"). The claims and causes of action asserted herein by the Plaintiffs arise out of or relate to an agreement dated March 2, 1984 between MPCN, as Seller, and numerous Buyers, including Defendant, concerning the sale of gas produced from the Heimdal Field in the North Sea off of the coast of Norway and an amendment thereto dated May 11, 1990 (collectively "the Agreement"), attached hereto as Exhibit "B", Tab 1. Article 15 of the Agreement provides in pertinent part:

> All claims, disputes and other matters arising out of or relating to this Agreement which the Parties are unable to resolve by mutual agreement within forty-five (45) days of the date the dispute first arose, except those matters that are to be referred to an expert in accordance with the terms and procedures set forth in Article 14 hereof, shall exclusively and finally be settled by arbitration in Stockholm, Sweden, in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce in Paris, or in the absence of any applicable rule, with the Procedural Laws of Sweden.

This action falls under the Convention because (1) the Agreement provides for arbitration in Sweden, which is a signatory to the Convention, (2) Defendant is not an American citizen, (3) the arbitration clause of the Agreement arises out of a commercial legal relationship, and (4) Article 15 of the Agreement constitutes an agreement in writing to arbitrate the disputes which are the subject of the claims and causes of actions asserted herein.

4. The arbitration provisions of the Agreement apply to Plaintiffs' claims because (1) the Plaintiffs' claims are founded in and intertwined with the underlying contractual obligations set out in the Agreement and the amendment thereto and are inherently inseparable from the issues governed by the arbitration agreement set forth in Article 15 of the Agreement, and (2) the damages sought by Plaintiffs flow directly from harm allegedly suffered by MPCN and Plaintiffs' status as affiliates of MPCN. *See McBro Planning and Development Co. v. Triangle Electrical Construction Co., Inc.*, 741 F.2d 342, 344 (11th Cir.



1984); *J.J. Ryan & Sons, Inc. v. Rhone-Poulenc Textile, SA.*, 863 F.2d 315, 320 (4th Cir. 1988). Specifically, Plaintiffs' claims arise out of and relate to the price of gas produced from the Heimdal Field and sold by MPCN to Defendant and others pursuant to the Agreement, which contains provisions relating to price. Plaintiffs' First Amended Petition shows on its face that the claims asserted herein are based on Defendant's alleged failure to pay a higher price for the gas covered by the Agreement. *See* First Amended Petition ¶¶ 24, 25, 29, 37, 38, 43, 52, and 60 (Exhibit "A", Tab 1). Plaintiff Marathon Oil Company has acknowledged that the alleged damages sought in this action arise from the alleged "negative cash flow of MPCN" and that those alleged damages were incurred as a result of Defendant's "lowering of gas prices since 1992." *See* Exhibit "B", Tab 2. Similarly, MPCN has described the alleged damages of Marathon Oil Company as losses resulting from advances of funds to MPCN "to cover MPCN's continuing losses." *See* Exhibit "B", Tab 3. At all relevant times, the rights and obligations under the license which forms the predicate for the claims of Plaintiff Marathon Petroleum Norge A/S ("MPN"), *see* First Amended Petition ¶¶ 16, 17, 21, and 33 (Exhibit "A", Tab 1), have been exercised and performed by MPCN pursuant to Pass Through Agreements dated June 25, 1975 and October 23, 1978. *See* Exhibit "B", Tabs 4 and 5. In short, all of the claims asserted by all of the Plaintiffs herein (1) arise from and relate to the contractual relationship and dealings between MPCN and Defendant under the Agreement and (2) seek recovery of damages directly flowing from harm allegedly suffered by MPCN as a result of Defendant's alleged conduct during the

course of that contractual relationship and those dealings. The subject matter of this action therefore relates to an arbitration agreement falling under the Convention providing this Court with original jurisdiction of this action under 9 U.S.C. § 203 and making this action removable under 9 U.S.C. § 205.

5. Diversity jurisdiction exists pursuant to 28 U.S.C. § 1332(a)(2), which provides for jurisdiction in suits between "citizens of a State and citizens or subjects of a foreign state." The First Amended Petition alleges that Plaintiff Marathon Oil Company is an Ohio corporation that maintains its principal office in Texas and that Plaintiff Marathon International Oil Company is a Delaware corporation that maintains its principal place of business in Texas. First Amended Petition ¶¶ 1, 2 (Exhibit "A", Tab 1). Defendant Ruhrgas AG is a German company with its principal place of business in Germany.

6. Plaintiff Marathon Petroleum Norge A/S ("MPN"), allegedly a Norwegian corporation with its principal office in Texas, was joined as a party plaintiff fraudulently and for the purpose of defeating diversity. Furthermore, MPN is not a real party in interest in this action and should not be considered for diversity jurisdiction purposes. MPN alleges that Ruhrgas' alleged tortious conduct rendered its license in the Heimdal field virtually worthless. First Amended Petition ¶ 33 (Exhibit "A", Tab 1). However, MPN's 1994 Annual Report indicates that it no longer holds any rights under the license:

> Marathon Petroleum Norge A/S is the registered holder of an interest in Norwegian Production License 036 (Block 25/4) [in the Heimdal Field]. The company's rights and obligations in respect of this License have been exercised and performed by Marathon Petroleum Company (Norway) under Pass Through Agreements dated June 25, 1975 and October 23, 1978.



Exhibit "B", Tabs 4 and 5. In addition, the statement of profit and loss for Marathon Petroleum Norge A/S indicates it had no operating activities in 1993 and 1994. *See* Exhibit "B", Tabs 6 and 7. MPN's own documents demonstrate that during the relevant time period it did not hold any rights under the license, and accordingly, it is not a real party in interest in this action. As such, MPN's citizenship should be ignored in determining diversity. Even if the citizenship of the real party in interest, MPCN, is to be considered, diversity nevertheless exists because MPCN is a Delaware corporation and, on information and belief, maintains its principal place of business in Houston, Texas. Accordingly, diversity jurisdiction exists, and removal is proper pursuant to 28 U.S.C. § 1441.

7. Federal question jurisdiction exists under 28 U.S.C. § 1331 because Plaintiffs' claims raise substantial questions of foreign and international relations and questions of customary international law and act-of-state questions which are incorporated into and form part of the federal common law. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964). Plaintiffs allege that Den Norske Stats Oljeselskap A.S. ("Statoil"), which Plaintiffs acknowledge to be "Norway's state owned oil and gas company," *see* First Amended Petition ¶ 9 (Exhibit "A", Tab 1), has engaged in "wrongful acts and conspiratorial

activities," "negligently misrepresented or fraudulently represented" facts, committed "breaches of fiduciary duties," and engaged in a civil conspiracy with Ruhrgas AG. First Amended Petition ¶¶ 31, 33, 52, 60, 61 (Exhibit "A", Tab 1). These claims require resolution of issues of federal international relations law and therefore support federal question jurisdiction. *Grynberg Production Corp. v. British Gas, P.L.C.*, 817 F. Supp. 1338, 1365 (E.D. Tex. 1993). Further, because the interests of foreign countries in this litigation are substantial and international relations are affected, federal question jurisdiction exists. *Kern v. Jeppesen Sanderson, Inc.*, 867 F. Supp. 525, 531-32 (S.D. Tex. 1994); *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61, 62-63 (S.D. Tex. 1994). As such, removal is proper pursuant to 28 U.S.C. § 1441.

8. This Notice of Removal is filed timely, as thirty (30) days have not elapsed since Defendant Ruhrgas AG, the only defendant, first received notice, through service or otherwise, of a copy of a pleading, motion, order or other paper from which it may first have been ascertained that the case was removable. Specifically, Ruhrgas AG first received a copy of Plaintiffs' Original Petition through the mail on July 24, 1995. Although this does not constitute proper service of process under the Hague Service Convention, in an abundance of caution, Ruhrgas is removing the action today to avoid any possible claim of waiver of its right to remove the action.

9. All conditions and procedures for removal have been satisfied, including those required by Local Rule 3(K).



10. A filing fee of $120.00 has been tendered to the Clerk of the United States District Court for the Southern District of Texas, Houston Division.

11. Defendant Ruhrgas AG has given written notice of the filing of this Notice of Removal to all adverse parties and will file a copy of the Notice of Removal with the Clerk of the 152nd Judicial District Court of Harris County, Texas.

Accordingly, Defendant removes this case now pending in the 152nd Judicial District Court of Harris County to this Court.

Respectfully submitted,

/s/ Ben H. Sheppard, Jr.
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**CERTIFICATE OF SERVICE**

I hereby certify that true and correct copies of the foregoing were served on all counsel of record by certified mail, return receipt requested this 21st day of August, 1995.

/s/ Ben H. Sheppard, Jr.
BEN H. SHEPPARD, JR.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| MARATHON OIL COMPANY, MARATHON INTERNATIONAL OIL COMPANY, and MARATHON PETROLEUM NORGE A/S, | § | CIVIL ACTION NO. H-95-4176 |
| Plaintiffs, | § | |
| VS. | § | |
| RUHRGAS, A.G., | § | |
| Defendant. | § | |

**RUHRGAS AG'S MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(2), (4), AND (5)**

(Filed Aug. 28, 1994)

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

RUHRGAS AG, in lieu of an answer, files this Motion to Dismiss Under Fed. R. Civ. P. 12(b)(2), (4), and (5) and moves the Court as follows:

1. To dismiss this action pursuant to Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction over Ruhrgas AG. Ruhrgas AG does not have regular or continuous and systematic contacts with Texas. Further, this cause of action does not arise out of or relate to any contact between Ruhrgas AG and Texas. The evidence demonstrates that Ruhrgas AG lacks sufficient contacts with

Texas to support personal jurisdiction. Ruhrgas AG specifically denies the jurisdictional facts alleged by Plaintiffs.

2. Subject to the Court's ruling on personal jurisdiction, to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(4) and (b)(5) for insufficiency of process and insufficiency of service of process, or to quash service. The United States and the Federal Republic of Germany are signatories to the Hague Service Convention. Germany objects to service other than through the proper German central authority. Plaintiffs have not served Ruhrgas AG through that proper authority. Furthermore, the petition has not been translated into German.

3. This motion is supported by the following affidavits:

a. Affidavit of Lutz K. Eckert, attached as Exhibit "A";

b. Affidavit of Wolf-Dietrich W. Hoffmann, attached as Exhibit "B";

c. Affidavit of Carl-Sylvius von Falkenhausen, attached as Exhibit "C";

d. Affidavit of Eike Benke, attached as Exhibit "D"; and

e. Affidavit of Dirk R. Plambeck, attached as Exhibit "E".

4. This motion is also supported by the memorandum filed simultaneously with the Motion. The memorandum and the attached exhibits are incorporated herein by reference for all purposes.



5. Ruhrgas AG reserves the right to amend its memorandum and to provide additional evidence in support of this motion.

WHEREFORE, RUHRGAS AG respectfully requests that (1) the Court dismiss this action for lack of personal jurisdiction, and (2) subject to the Court's ruling on personal jurisdiction, the Court dismiss Plaintiffs' claims pursuant to 12(b)(4) and (b)(5) or quash service.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served on counsel of record for Plaintiffs by certified mail, return receipt requested this 28th day of August, 1995.

/s/ Ben H. Sheppard, Jr.
BEN H. SHEPPARD, JR.

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IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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CIVIL ACTION NO. H-95-4176

---

MARATHON OIL COMPANY, MARATHON INTERNATIONAL OIL COMPANY and MARATHON PETROLEUM NORGE A/S,

Plaintiffs,

VS.

RUHRGAS, A.G.,

Defendant.

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**RUHRGAS AG'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(2), (4), AND (5)**

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(Aug. 28, 1994)

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ATTORNEY-IN-CHARGE
FOR DEFENDANT,
RUHRGAS AG

---

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

| | | |
|---|---|---|
| MARATHON OIL COMPANY, MARATHON INTERNATIONAL OIL COMPANY, and MARATHON PETROLEUM NORGE A/S, | ) | CIVIL ACTION NO. H-95-4176 |
| Plaintiffs, | ) | |
| VS. | ) | |
| RUHRGAS, A.G., | ) | |
| Defendant. | ) | |

**RUHRGAS AG'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(2), (4) AND (5)**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Ruhrgas AG respectfully submits this Memorandum in Support of Motion to Dismiss Under Fed. R. Civ. P. 12(b)(2), (4) and (5).

## I.
## INTRODUCTION

The claims asserted in this lawsuit arise out of and relate to natural gas produced from the Heimdal Field in the Norwegian North Sea which Marathon Petroleum Company (Norway) ("MPCN"), an affiliate of the Plaintiffs, sold to Ruhrgas AG, a German company, and other European buyers. Sales of the gas are governed by the

Heimdal Gas Sales Agreement dated March 2, 1984 between MPCN, as seller, and Ruhrgas AG and the other European buyers, and an amendment thereto dated May 11, 1990 (collectively, the "Agreement") attached to the Notice of Removal as Ex. "B", Tab 1. All of the Heimdal Field gas purchased by Ruhrgas AG from MPCN is covered by the Agreement, which contains a Norwegian choice of law clause and an arbitration clause providing for arbitration in Stockholm, Sweden.

During the course of the contractual relationship between MPCN and the buyers under the Agreement, a number of issues relating to the Agreement and in particular to the price of gas arose and were the subject of disputes and negotiations which were conducted primarily in Europe. One such dispute led to an arbitration filed by MPCN with the International Court of Arbitration of the International Chamber of Commerce in 1987. That arbitration resulted in an award in September of 1989, which the buyers challenged in court in Stockholm, Sweden. While those proceedings were pending, negotiations ensued to resolve the disputes, the result of which was the amendment to the Heimdal Gas Sales Agreement, executed in Germany on May 11, 1990, and the withdrawal of the proceedings challenging the arbitration award. Subsequently, further disputes relating to the Agreement developed between MPCN and the buyers, which were the subject of further negotiation between MPCN and the buyers until the filing of this litigation.



## II.

## SUMMARY OF PLAINTIFFS' PETITION

In their First Amended Petition, Plaintiffs allege that Ruhrgas AG is liable under the following theories:

(1) fraud,

(2) tortious interference with prospective business relationships,

(3) participation in breach of fiduciary duty,

(4) constructive fraud, and

(5) civil conspiracy.

First Amended Petition ¶¶ 36-63. Curiously, Plaintiffs allege that Den Norske Stats Oljeselskap A.S. ("Statoil"), a Norwegian state-owned company, has engaged in "Wrongful acts and conspirational activities," "negligently misrepresented or fraudulently represented" facts, committed "breaches of fiduciary duties," and engaged in a civil conspiracy with Ruhrgas AG, First Amended Petition ¶¶ 31, 33, 52, 60, 61, yet Plaintiffs have not sued Statoil in this lawsuit.

## III.

## SUMMARY OF ARGUMENT

This memorandum establishes that this case against Ruhrgas AG must be dismissed pursuant to Fed. R. Civ. P. 12(b)(2), and subject to the court's ruling on personal jurisdiction and without waiving same, dismissed or service of process quashed pursuant to Fed. R. Civ. P. 12(b)(4) and 12(b)(5).

First, the Court does not have personal jurisdiction (specific or general) over Ruhrgas AG, a German corporation. Specific jurisdiction is absent because virtually all of the alleged conduct of Ruhrgas AG relating to this European dispute occurred outside of Texas. General jurisdiction is absent because Ruhrgas AG does not have regular, systematic, or continuous contacts with Texas. In addition, the Court's exercise of personal jurisdiction over Ruhrgas AG would offend traditional notions of fair play and substantial justice. ***See infra,*** Section IV.

Second, subject to the Court's ruling on personal jurisdiction, the case should be dismissed for insufficiency of service of process or, alternatively, service of process should be quashed. Plaintiffs have improperly served Ruhrgas AG in two respects because of their failure to comply with the Hague Service Convention. First, Plaintiffs attempted to serve Ruhrgas AG through the Texas Secretary of State. Germany has specifically exercised its right under the Hague Convention to require all service of process to be sent to the proper German central authority. Second, Plaintiffs failed to have either the Original or First Amended Petition translated into German as required by the Hague Service Convention. ***See infra,*** Section V.

## IV.

## EXERCISING PERSONAL JURISDICTION OVER RUHRGAS AG WOULD VIOLATE THE DUE PROCESS CLAUSE

As a threshold issue, the Court must examine whether the exercise of personal jurisdiction over



Ruhrgas AG accords with the Due Process Clause of the Fourteenth Amendment. ***Dalton v. R & W Marine, Inc.,*** 897 F.2d 1359, 1361 (5th Cir. 1990); ***Villar v. Crowley Maritime Corp.,*** 780 F. Supp. 1467, 1474-75 (S.D. Tex. 1992), *aff'd*, 990 F.2d 1489 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 690 (1994). The determination of whether due process has been satisfied entails a two-pronged inquiry. ***Jones v. Petty-Ray Geophysical Geosource, Inc.,*** 954 F.2d 1061, 1068 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 193 (1992). First, the nonresident defendant must have some "minimum contacts" with the forum state resulting from an affirmative act or acts on its part. ***Id.*** Second, the exercise of personal jurisdiction over the nonresident defendant must comport with traditional notions of fair play and substantial justice. ***Id.*** Consistent with the concept of due process, courts may exercise either general or specific personal jurisdiction over nonresident defendants. ***Helicopteras Nacionales de Colombia, S.A. v. Hall,*** 466 U.S. 408, 414 (1984); ***Bearry v. Beech Aircraft Corp.,*** 818 F.2d 370, 375-76 (5th Cir. 1987). However, a unanimous United States Supreme Court has cautioned against the exercise of personal jurisdiction in cases such as this:

> The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.

***Asahi Metal Indus. Co. v. Superior Court,*** 480 U.S. 102, 114 (1987).

### A. Ruhrgas AG Does Not Have Sufficient Minimum Contacts with Texas so as to Support the Exercise of Specific or General Personal Jurisdiction Over It.

Minimum contacts must result from a defendant's own activities directed toward the forum state. Restated, a defendant must "purposefully avail[ ] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." ***Hanson v. Denckla,*** 357 U.S. 235, 253 (1958); ***see also Asahi Metal,*** 480 U.S. at 109; ***Burger King Corp. v. Rudzewicz,*** 471 U.S. 462, 475 (1985); ***World-Wide Volkswagen Corp. v. Woodson,*** 444 U.S. 286, 297 (1980). When the activities of a nonresident defendant in a forum are isolated or disjointed, jurisdiction is proper only if the cause of action arises from a particular activity of the defendant within the forum. In these instances, jurisdiction is said to be specific. ***Burger King Corp.,*** 471 U.S. at 472; ***Helicopteros Nacionales,*** 466 U.S. at 414 n.8. In order for general jurisdiction to exist, the nonresident defendant's contacts with the forum state must be continuous and systematic. ***Bullion v. Gillespie,*** 895 F.2d 213, 216 (5th Cir. 1990). When a claim of general jurisdiction is alleged, a high level of contact with the forum state is required to support jurisdiction. ***Dalton,*** 897 F.2d at 1362. The following discussion establishes that neither specific nor general jurisdiction over Ruhrgas AG exists in Texas.



#### 1. Ruhrgas AG Has Not Submitted Itself to the Specific Jurisdiction of Texas Courts.

In order for specific jurisdiction to apply, the causes of action must arise from a particular activity of the nonresident defendant within the forum. ***Burger King Corp.,*** 471 U.S. at 472; ***Helicopteros Nacionales,*** 466 U.S. at 414 n.8. Thus, specific jurisdiction is premised on contacts with the forum that are related to the particular controversy. Crucial to the specific jurisdiction analysis is the relationship among the defendant, the forum, and the litigation. ***Southmark Corp. v. Life Investors, Inc.,*** 851 F.2d 763, 772 (5th Cir. 1988). Moreover, the nonresident defendant's conduct within the forum must be such that he should reasonably anticipate being haled into court there. ***World-Wide Volkswagen,*** 444 U.S. at 297. No defendant should be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts. ***Burger King Corp.,*** 471 U.S. at 486.

The nonresident defendant must purposefully avail himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws. ***Holt Oil & Gas Corp. v. Harvey,*** 801 F.2d 773, 777 (5th Cir. 1986), *cert. denied,* 481 U.S. 1015 (1987). In the determination of whether a foreign corporation should be required to defend itself in a suit in Texas arising out of a contract between it and a Texas corporation, each case must be decided on its own facts. ***Hydrokinetics, Inc. v. Alaska Mechanica, Inc.,*** 700 F.2d 1026, 1028 (5th Cir. 1983), *cert. denied,* 466 U.S. 962 (1984). Considerations such as the quality, nature, and extent of the activity in the forum, the foreseeability of consequences within the

forum from activities outside it, and the relationship between the cause of action and the contacts, are important in determining whether the nonresident defendant's actions constitute "purposeful availment." ***Hydrokinetics,*** 700 F.2d at 1028.

The causes of action asserted herein are based on an agreement for the sale and delivery of natural gas from a field in the Norwegian North Sea to numerous European buyers. Hoffmann Affidavit ¶ 3 (Ex. "B")[1] The Agreement was executed in Europe, is governed by Norwegian law, is to be performed in Europe, and contains an arbitration clause providing for arbitration in Stockholm, Sweden. ***Id.*** ¶¶ 4, 6 & 9. The Agreement provides for the purchase and sale of gas to Ruhrgas AG in Europe and all payments under the Agreement have been to MPCN to accounts in London, England and New York. ***Id.*** ¶ 4. None of these payments were made to accounts in Texas. ***Id.***

Over the course of years, dozens of meetings between representatives of MPCN, Ruhrgas AG and the other buyers relating to the Agreement have taken place. Hoffmann Affidavit ¶ 8 (Ex. "B"). Only three of these meetings were held in Houston, Texas rather than Europe and these meetings also dealt with the Agreement. ***Id.***

The first meeting in Houston occurred on February 20, 1987. ***Id.*** That meeting was between MPCN and the

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[1] The originals of each referenced Affidavit are attached to Ruhrgas AG's Motion to Dismiss Under Fed. R. Civ. P. 12(b)(2), (4) and (5). Copies of the referenced Affidavits are also attached here for convenient reference.



group of buyers under the Agreement, including Ruhrgas AG. The subject of that meeting was a dispute relating to the Agreement that had arisen between MPCN and the group of buyers, including Ruhrgas AG. ***Id.*** As the dispute was not resolved in this meeting, MPCN initiated arbitration against Ruhrgas AG and the other buyers in accordance with the arbitration provisions of the Agreement. ***Id.***

On November 28, 1989, Ruhrgas AG and the other buyers under the Agreement attended a second meeting in Houston. ***Id.*** The subject of this meeting was the negotiation of an overall settlement agreement on the pending contractual issues including new price provisions for gas to be delivered under the Agreement. ***Id.*** A third meeting occurred in Houston on April 24-25, 1990. ***Id.*** The subject of the third meeting was the same as the second and led to the amendment dated May 11, 1990. ***Id.*** The amendment was not signed in Texas; rather, it was signed in Essen, Germany. ***Id.*** No other meetings in Texas have occurred since April 1990. ***Id.***

Plaintiffs suggest that specific jurisdiction may be sustained over Ruhrgas AG because it allegedly has done business in Texas within the meaning of the Texas long-arm statute. TEX. CIV. PRAC. & REM. CODE ANN. § 17.042; First Amended Petition ¶ 4. The Texas long-arm statute extends personal jurisdiction to nonresidents when the action arises from the nonresidents' business in the state, and doing business includes committing a tort in Texas. ***Id.*** Plaintiffs allege fraud, tortious interference with prospective business relationships, breach of fiduciary duty, constructive fraud, and civil conspiracy. First Amended Petition ¶¶ 36-63. These allegations arise from and relate

to the Agreement between Ruhrgas AG, the other buyers, and MPCN. Hoffmann Affidavit ¶¶ 3,7 & 8. (Ex. 111311).

In ***Jones, Southmark,*** and ***Hydrokinetics,*** under similar facts, the Fifth Circuit found insufficient contact to sustain specific jurisdiction.

**a. *Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 193 (1992).**

In ***Jones,*** a widow brought a tort claim pursuant to the Texas long-arm statute against Geosource, her late husband's employer. Geosource filed a third-party complaint against Total Exploration for contractual indemnity and contribution. Total Exploration was a French corporation for whom Geosource was performing subcontracting work. Total Exploration moved for dismissal based on lack of personal jurisdiction. ***Id.*** at 1063. The plaintiff alleged that her husband, a Texas resident, was murdered by anti-government rebels while employed by Geosource in Sudan. The plaintiffs cause of action was based on the defendants' negligent failure to warn her husband, Jones, of the danger of attack by rebels. Geosource sent Jones to Sudan to perform under a contract between Geosource and Total Exploration. The contract was negotiated primarily by telephone and telex between Geosource's United Kingdom office and Total Exploration's Paris office. However, several of the communications originated from Geosource's Houston office, although no face-to-face negotiations were conducted in Texas. The plaintiff alleged the following facts sufficiently tied Total



Exploration to Texas: (1) Geosource was required to purchase materials from Total Exploration, and Total Exploration knew the funds would originate from Texas; (2) a portion of Geosource's performance occurred in Texas, i.e., employment of Texas residents, payment for equipment purchases, and arrangement of work schedules; and (3) Geosource was required to maintain insurance, which was foreseeably obtained in Texas. ***Id.*** at 1068-69. The Fifth Circuit rejected this conduct as a basis for personal jurisdiction, and held that Total Exploration was not subject to specific jurisdiction. The factors that the Court deemed determinative in ***Jones*** require dismissal in this case:

- The contract between Geosource and Total Exploration was not executed in Texas. *Id.* at 1067.

- ***Similarly, the Agreement in this case was executed in Europe, not in Texas.*** Hoffmann Affidavit ¶ 4 (Ex. "B").

- The Geosource contract contained a choice of law clause requiring arbitration under English law. Thus, the circumstances surrounding the negotiation and formation of the contract indicated "rather forcefully that Total Exploration did not purposefully direct its activities toward Texas." *Id.* at 1069.

- ***The Agreement stipulated that Norwegian law governs the Agreement, and provided for the resolution of all disputes by arbitration in Sweden.*** Hoffmann Affidavit ¶¶ 5, 6 & 9 (Ex. "B").

- Total Exploration negotiated with Geosource for exploration work in Sudan, and Geosource's Texas office is a "mere fortuity." M. at 1069.

    - ***Ruhrgas AG negotiated with MPCN almost exclusively in Europe. At the time the parties entered into the Agreement, MPCN's principal place of business was in Ohio and it only later moved its offices to Texas. See Heimdal Gas Saks Agreement dated March 2, 1984, attached to the Notice of Removal as Ex. "B," Tab 1, and letter from MPCN as Ex. "B," Tab 9. The fact that MPCN has a Texas office is a "mere fortuity."***

The *Jones* rationale makes apparent that Ruhrgas AG, under similar facts, did not avail itself to the jurisdiction of Texas.

**b. *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763 (5th Cir. 1988).**

In *Southmark*, a prospective stock purchaser brought suit against the seller of stock and the stock's ultimate purchaser alleging breach of contract and tortious interference with business relations. Southmark, the plaintiff, alleged that it contractually agreed with Life to purchase stock. Subsequently, Life sold the stock to USLICO. Southmark contended that USLICO tortiously interfered with its contract and business relations with Life. Southmark was incorporated in Georgia with its principle place of business in Texas. USLICO was a Virginia company. The plaintiff alleged that the district court had specific



jurisdiction over USLICO because there was evidence that USLICO committed an intentional tort against Southmark in Texas. The district court held that USLICO's contacts with Texas were insufficient to establish specific jurisdiction, and the Fifth Circuit affirmed. *Id.* at 764. The Fifth Circuit based its finding of no specific jurisdiction on the following factors:

- USLICO did not expressly aim its allegedly tortious activities at Texas, nor was Texas the focal point of USLICO's allegedly tortious conduct. *Id.* at 772.

    - ***Ruhrgas AG never expressly aimed any of its alleged tortious activities at Texas, nor was Texas the focal point of any of Ruhrgas AGs activities under the Agreement.*** Hoffmann Affidavit ¶ 4 (Ex. "B").

- There was no evidence that the sale of stock contract between Life and Southmark was made or to be performed in Texas. *Id.*

    - ***The Agreement from which the tortious allegations arise was not executed in Texas. Further, the Agreement provides for no performance in Texas and contains no reference to Texas. The Agreement was executed in Europe and was to be performed in Europe.*** Hoffmann Affidavit ¶ 4 (Ex. "B").

- There was no evidence that the alleged contract between Southmark and Life was to be governed by Texas law. *Id.*

    - ***Ruhrgas AG had no intention that the Agreement or any actions arising from the Agreement were to be governed by Texas law. The Agreement contained a specific***

***choice of law provision indicating that Norwegian law would resolve all conflicts. Moreover, the Agreement provides that disputes would be subject to arbitration in Stockholm, Sweden.*** Hoffmann Affidavit ¶¶ 5, 6 & 9 (Ex. "B").

- USLICO was not a Texas corporation and did not do any business in Texas. *Id.* at 773.

  - ***Ruhrgas AG does not have a place of business in Texas. Ruhrgas AG is neither chartered nor licensed to do business in Texas. Ruhrgas AG has never performed any natural gas operations in Texas or sold any product that reached Texas. Ruhrgas AG has not bought or sold gas in Texas or elsewhere in the United States.*** Eckert Affidavit ¶¶ 4 & 16 (Ex. "A").

- The stock subject to the alleged contract was not located in Texas or to be purchased in Texas. *Id.*

  - *Ruhrgas AG is engaged in the business of providing natural gas to the European market.* Eckert Affidavit ¶ 3 (Ex. "A"). ***The Agreement provides for the purchase and sale of gas to Ruhrgas AG in Europe. Hoffmann Affidavit ¶ 4 (Ex. "B").***

- Southmark itself was incorporated in Georgia. The fact that Southmark had its principal place of business in Texas was a "mere fortuity." The fact that Southmark was a Texas resident for jurisdictional purposes stemming from its principal place of business in Texas would not cause USLICO to anticipate being haled into a Texas court to answer for its conduct. *Id.*



  - ***MPCN is incorporated in Delaware. When the Agreement was executed, MPCN's principal place of business was in Ohio. Agreement attached to Notice of Removal at Ex. "B," Tab 1. It is by "mere fortuity" that MPCN moved its principal place of business to Texas. See*** Ex. "B," Tab 9 to Notice of Removal.

Like USLICO, Ruhrgas AG does not have sufficient minimum contacts to establish specific jurisdiction.

**c. *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026 (5th Cir. 1983), *cert. denied*, 466 U.S. 962 (1984).**

In ***Hydrokinetics,*** a Texas corporation brought a breach of contract claim in federal district court against Alaska Mechanical, Inc., an Alaskan corporation. Hydrokinetics, the plaintiff, contracted with Alaska Mechanical to manufacture goods for Alaska Mechanical's construction business. Hydrokinetics alleged the following Texas contacts: (1) Alaska Mechanical agreed to purchase goods to be manufactured in Texas; (2) payment was made in Texas; (3) prior to executing the contract, the parties engaged in extensive communications originating in Texas and Alaska; (4) Alaska Mechanical officers traveled to Texas to finalize the agreement; and (5) the contract was formally created in Texas. ***Id.*** at 1028-29. The Fifth Circuit held that these contacts were not sufficient to establish specific jurisdiction. The Court reviewed the

"totality of the facts" to conclude that the necessary purposeful availment was not present. *Id.* at 1029. The Court found the following facts persuasive:

- Alaska Mechanical did not regularly engage in business in Texas. Its sole contact with Texas was the single, isolated transaction involved in this case. *Id.* at 1029.
  - ***Ruhrgas AG does not regularly engage in business in Texas.*** Eckert Affidavit ¶¶ 4-14 (Ex. "A").
- The agreement between Hydrokinetics and Alaska Mechanical included a choice of law provision expressly providing that it was to be governed according to Alaska law. *Id.*
  - ***The Agreement contained a choice of law provision expressly providing that any disputes would be resolved according to Norwegian law and by arbitration in Sweden.*** Hoffmann Affidavit ¶¶ 5, 6 & 9 (Ex. "B").
- No performance under the contract by Alaska Mechanical was to take place in Texas, other than payment for the goods. *Id.*
  - ***No performance under the Agreement was to take place in Texas. Moreover, Ruhrgas AG made no payments in Texas.*** Hoffmann Affidavit ¶ 4 (Ex. "B").
- The fact that Alaska Mechanical officials traveled to Texas to inspect Hydrokinetic's facilities and to resolve disputes between the parties is relevant, but it is not "sufficient to alter the basic quality of the nature of Alaska Mechanical's contact with the state of Texas." *Id.*



- ***Ruhrgas AG attended three meetings in Texas, as compared to dozens in Europe, to resolve issues related to the Agreement.*** Hoffmann Affidavit ¶ 8 (Ex. "B").

In determining specific jurisdiction where a cause of action arises from a contract, the Fifth Circuit has repeatedly held that the following factors are determinative: a choice of law provision, the place of performance or place where the contract is executed, and the "mere fortuity" that a principal place of business exists in the forum state. ***See Jones,*** 954 F.2d at 1069; ***Southmark,*** 851 F.2d at 773; ***Holt,*** 801 F.2d at 778; ***Hydrokinetics,*** 700 F.2d at 1029 (choice of law provision determinative). In this case, the Agreement contains a choice of law provision that it will be governed and construed in accordance with Norwegian law. Moreover, the Agreement contains a binding arbitration clause mandating that all disputes arising under the Agreement be resolved by arbitration in Sweden. Thus, Ruhrgas AG never anticipated being subject to *any* American court, and certainly not Texas courts. The only Texas connection under the Agreement results from MPCN moving its offices to Texas in 1986, a "mere fortuity." Applying the factors utilized by the Fifth Circuit, there is no basis on which this Court can exercise specific jurisdiction over Ruhrgas AG.

**2. Ruhrgas AG has not Submitted Itself to the General Jurisdiction of Texas Courts.**

Under the facts described in the Affidavits of Eckert (Ex. "A"), von Falkenhausen (Ex. "C"), Benke (Ex. "D") and Plambeck (Ex. "E") and the holdings in ***Helicopteros Nacionales*** and ***Bearry,*** Ruhrgas AG has not submitted

itself to the general jurisdiction of the courts sitting in Texas.

a. ***Helicopteros Nacionales de Colombia v. Hall,*** 466 U.S. 408 (1984)

In ***Helicopteros Nacionales,*** a Colombian helicopter chartering company ("Helicol") was sued in a Harris County District Court. The wrongful death claim arose from the crash of a helicopter in Peru with American citizens aboard. ***Id.*** at 409-10. The Supreme Court of Texas held that Helicol's contacts with Texas were sufficient to allow the court to assert personal jurisdiction. ***Id.*** at 409. The United States Supreme Court disagreed and reversed. The United States Supreme Court identified the following contacts of Helicol with Texas: (1) negotiating sessions in Houston for various contracts, (2) purchasing helicopters, spare parts, and accessories from Bell Helicopter Company in Fort Worth over the course of seven years for a total of more than $4 million, (3) sending pilots to Bell Helicopter in Fort Worth for training and ferrying helicopters from Fort Worth to South America, (4) sending management and maintenance personnel to visit Bell Helicopters in Fort Worth to receive "plant familiarization" and for technical consultation, and (5) receiving money into its bank accounts from checks drawn on Texas banks. ***Id.*** at 411. The United States Supreme Court expressly found that these contacts were not sufficient to satisfy the requirement of the due process clause of the Fourteenth Amendment and reversed the judgment of the Texas Supreme Court. ***Id.*** at 418-19.



The conclusion reached by the United States Supreme Court in ***Helicopteros Nacionales*** is also compelled in this case. The cases are parallel:

- Helicol never had been authorized to do business in Texas and never had an agent for service of process in Texas. *Id.* at 411;
  - ***Ruhrgas AG never has been authorized to do business in Texas and never has had an agent for service of process in Texas.*** Eckert Affidavit ¶ 4 (Ex. "A").
- Helicol never performed helicopter operations in Texas or sold any product that reached Texas. ***Id.;***
  - ***Ruhrgas AG never performed natural gas operations in Texas or sold any product that reached Texas.*** Eckert Affidavit ¶ 16 (Ex. "A").
- Helicol never owned real or personal property in Texas and never maintained an office or establishment in Texas. ***Id.;***
  - ***Ruhrgas AG never has owned real or personal property in Texas and never maintained an office or establishment in Texas.*** Eckert Affidavit ¶¶ 7 & 8 (Ex. "A").
- Helicol did not maintain records in Texas and had no shareholders in Texas. ***Id.;***
  - ***Ruhrgas AG has not maintained records in Texas and has no shareholders in Texas.*** Eckert Affidavit ¶¶ 8 & 12 (Ex. "A").
- In Helicol, the United States Supreme Court held "Helicol's contacts with the State of

> Texas were insufficient to satisfy the requirements of the Due Process Clause of the Fourteenth Amendment." *Id.* at 418-19.
>
> - ***In this case, Ruhrgas AGs contacts with the State of Texas are insufficient to satisfy the requirements of the Due Process Clause of the Fourteenth Amendment.***

Moreover, although Ruhrgas AG has sent personnel to Houston for training as described in the Affidavit of Mr. Von Falkenhausen (Ex. "C"), the Supreme Court also addressed the same issue in ***Helicopteros Nacionales*** and dismissed the significance of such contacts with the following holding:

> [W]e hold that mere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of *in personam* jurisdiction over nonresident corporation in a cause of action not related to those purchase transactions. ***Nor can we conclude that the fact that Helicol sent personnel into Texas for training*** in connection with the purchase of the helicopters and equipment in that State in any way enhanced the nature of Helicol's contacts with Texas.

***Helicopteros Nacionales,*** 466 U.S. at 418 (emphasis added).

In sum, just as the ***Helicopteros Nacionales*** court found that Helicol could not be sued in Texas under general jurisdiction principles, Ruhrgas AG cannot be sued in Texas under those principles.



### b. ***Bearry v. Beech Aircraft Corp.,*** 818 F.2d 370 (5th Cir. 1987)

In ***Bearry,*** Beech Aircraft Corporation ("Beech"), the defendant, was a Delaware corporation with its principal place of business in Kansas. Beech had no telephone listing, warehouse, manufacturing facility, or bank account in Texas. Beech did not insure any person, own any real estate, pay any taxes, or permanently assign employees or directors to work in Texas. ***Id.*** at 372. Over a five-year period, Beech employed over three hundred marketing employees at its Kansas office in a nationwide marketing campaign. During this period, there were sales of nearly $250 million to seventeen Texas dealers. ***Id.*** One of those dealers was a wholly-owned subsidiary of Beech. In fact, Beech manufactured air frame assemblies for Bell Helicopters in Fort Worth, "under contracts exceeding $72 million." ***Id.*** at 373. Beech representatives even "visited the Texas dealers on occasion to assist them with maintenance problems, to demonstrate new aircraft, and to offer sales incentives to the Texas dealers, but only at a dealer's request." ***Id.*** Under these facts, the Fifth Circuit found that Beech's contacts with Texas were not the "continuous and systematic contacts on which general jurisdiction could be based." ***Id.*** at 375. Accordingly, the Fifth Circuit held that Beech was not subject to the jurisdiction of the courts sitting in Texas. ***Id.*** at 377.

As in ***Bearry,*** Ruhrgas AG does not have continuous and systematic contacts with Texas. The Eckert Affidavit (Ex. "A") establishes the following:

(1) Ruhrgas AG is not organized under Texas law. It is a German corporation and its

principal place of business is in Essen, Germany (¶ 2);

(2) Ruhrgas AG does not have a place of business in Texas and has never been licensed or chartered to do business in Texas (¶ 4);

(3) Ruhrgas AG does not possess any type of license or business certificate issued by any government entity or political subdivision of Texas (¶ 6);

(4) Ruhrgas AG does not maintain an office, manufacturing plant, or facility in Texas (¶ 7);

(5) Ruhrgas AG does not own any real estate, bank accounts, financial instruments, or other physical assets in Texas (¶ 8);

(6) Ruhrgas AG has no agents, sales representatives, directors, officers or shareholders who are employed, regularly assigned to work, or reside within Texas (¶ 12);

(7) Ruhrgas AG does not have telephone listings or 1-800 telephone lines in Texas (¶ 9);

(8) Ruhrgas AG does not advertise its services in Texas publications (¶¶ 10 & 11);

(9) Ruhrgas AG has never filed suit in Texas, petitioned any governmental agency, or otherwise purposely availed itself of the privilege of conducting business in Texas, other than the actions taken in this suit (¶ 15);

(10) Ruhrgas AG has not maintained continuous or systematic contacts with Texas (¶ 5).



(11) Unlike Beech, the natural gas provided by Ruhrgas AG is not used in Texas – it is used in Europe (¶¶ 3, 16).

Ruhrgas AG's contacts with Texas have not been sufficiently continuous and systematic to constitute acquiescence to the general jurisdiction of the courts in Texas. Like Beech, Ruhrgas AG is not subject to suit in any Texas court.

Plaintiffs' First Amended Petition suggest that personal jurisdiction can be sustained over Ruhrgas AG because it allegedly "owns a 20% interest in Texas-based Tenneco Oil Company." First Amended Petition ¶ 4. Plaintiffs are factually and legally incorrect. Ruhrgas does not own 20% of Tenneco Oil Company; rather, it owns 20% of the stock of Tenneco Energy Resources Corporation ("TERC"). Benke Affidavit ¶ 3 (Ex. "D"). Further, as shown below, Ruhrgas AG's involvement with TERC does not constitute continuous and systematic contacts with Texas as are necessary to confer general jurisdiction.

Ruhrgas has sent some of its young, low-level employees for short periods of time to work in Texas for TERC. von Falkenhausen Affidavit ¶ 4 (Ex. "C"). While on assignment to TERC, the trainee-employees work under the direction, supervision, and control of TERC management and are bound by TERC's instructions in the performance of their work. ***Id.*** While on the training assignment at TERC, the trainee-employees are not acting or representing Ruhrgas AG. ***Id.***

Ruhrgas has one voting member on the board of directors of TERC. Benke Affidavit ¶ 3 (Ex. "D"). However, he does not have any executive powers. ***Id.*** He

periodically travels between Germany and Houston. ***Id.*** Other than Ruhrgas AG's investment in TERC and the arrangement for the training of Ruhrgas AG employees by assignment to TERC, Ruhrgas AG and TERC have no contracts or other business dealing with one another. ***Id.***

The Supreme Court's holding in ***Helicopteros Nacionales,*** discussed ***supra,*** requires rejection of any general jurisdiction argument based on the training of personnel through TERC, the visits to Houston of Ruhrgas AG single board member on the TERC board, or the participation of an executive of Ruhrgas AG on the European Advisory Council of Tenneco, Inc. See Plambeck Affidavit (Ex. "E"). Moreover, Ruhrgas AG's investment in TERC, the arrangement for the training of Ruhrgas AG employees by assignment to TERC, and the participation on the European Advisory Council of Tenneco, Inc. are unrelated to the causes of action Plaintiffs assert against Ruhrgas AG in this action. Eckert Affidavit ¶ 18 (Ex. "A").

Neither does Ruhrgas AG's investment in TERC create general jurisdiction. Plaintiff's argument was rejected by the court in ***Construction Aggregates, Inc. v. Senior Commodity Co.,*** 860 F. Supp. 1176 (E.D. Tex. 1994), *aff'd,* 48 F.3d 531 (5th Cir. 1995). In ***Construction Aggregates,*** plaintiff argued that the court had general jurisdiction over the defendant because of his investment in a motel located in Texas. ***Id.*** at 1179. The defendant was a limited partner in the hotel and possessed a right to 10% of any profits from the partnership and had inspected the property on one occasion. ***Id.*** The court held that "its strains reason to infer that anyone buying a limited partnership



interest as a passive investment in a Texas limited partnership impliedly consents to or expects to be haled into court on any and all suits brought in Texas." ***Id.*** at 1180. The court relied on the Supreme Court's holding in ***Shaffer v. Heitner,*** 433 U.S. 186, 216 (1977), which noted that it strains reason to suggest that anyone buying securities in a corporation impliedly consented to any and all suits brought in the company's state of incorporation. This same analysis applies here and requires rejection of any contention that Ruhrgas AG's investment in TERC confers the Texas courts with general jurisdiction over Ruhrgas AG.

### B. Exercising Personal Jurisdiction over Ruhrgas AG Would Offend Traditional Notions of Fair Play and Substantial Justice.

Even assuming Ruhrgas AG had minimum contacts with Texas, the Court cannot exercise jurisdiction over it if it would offend traditional notions of fair play and substantial justice. ***International Shoe,*** 326 U.S. at 316; ***Villar,*** 780 F. Supp. at 1475. The determination of whether exercising jurisdiction over a nonresident defendant offends traditional notions of fair play and substantial justice depends on several factors. The principal factors are as follows:

(1) the burden on the defendant;

(2) the forum state's interest in the dispute;

(3) the plaintiffs interest in obtaining relief;

(4) the most efficient judicial resolution of the controversy; and

(5) the interest of the several states in furthering social policies.

*Villar,* 780 F. Supp. at 1481 (citing ***Asahi Metal,*** 480 U.S. at 113); ***see also World-Wide Volkswagen,*** 444 U.S. at 292; ***Brand v. Menlove Dodge,*** 796 F.2d 1070, 1075 (9th Cir. 1986). Application of these factors to the facts of this case reveals that forcing Ruhrgas AG to defend itself in Texas would not be fair or reasonable.

### 1. The Burden on Ruhrgas AG is Great.

The burden on Ruhrgas AG, which is located in Germany, in having to defend itself in Texas, would be great. Hoffmann Affidavit ¶¶ 10-12 (Ex. "B"). Courts have recognized that "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." ***Asahi Metal,*** 480 U.S. at 114. The primary concern in determining whether an exercise of personal jurisdiction is reasonable is the burden on the defendant rather than the burden on the plaintiff. ***Insurance Co. of No. Am. v. Marina Salina Cruz,*** 649 F.2d 1266, 1272 (9th Cir. 1981) ("If the burdens of trial are too great for a plaintiff, the plaintiff can decide not to sue or, perhaps, to sue elsewhere. A defendant has no such luxury. The burdens on a defendant are of particular significance if, as here, the defendant has done little to reach out to the forum state."). It is "common knowledge" that it is inconvenient and burdensome for a corporation to defend any lawsuit away from its principal place of business. ***See Davis v. Farmers' Co-op Equity Co.,*** 262 U.S. 312, 315 (1923); ***Bearry,*** 818 F.2d at 377 (noting the "real" burden placed upon the defendant). The burden is even greater for a foreign corporation that has no offices in the United States and which must defend itself in a suit abroad. ***Asahi Metal,*** 480 U.S. at 114. In general jurisdiction cases like this, where the incident at issue had nothing to do with the forum, the burden on the European defendant is great.



### 2. Texas Has Little Interest In the Dispute.

Texas' interest in this litigation is slight. It is a dispute over an agreement among numerous European parties concerning natural gas from a Norwegian North Sea field. Hoffmann Affidavit ¶ 3 (Ex. "B"). The allegations of Plaintiffs' First Amended Petition reveal that the focus of this lawsuit is in Europe. The First Amended Petition alleges that "this case arises out of a conspiracy" among Ruhrgas AG and Statoil – "Norway's state owned oil and gas company" – and others "to monopolize the Western European market for natural gas." First Amended Petition ¶¶ 6, 9. Plaintiffs allege that Statoil, Ruhrgas AG and a consortium of European gas buyers "launched a plan to monopolize the Western European gas market." First Amended Petition ¶ 12. Furthermore, Ruhrgas AG is not a resident of Texas. Eckert Affidavit ¶ 2 (Ex. "B"). Moreover, resolution of this dispute against Ruhrgas AG in Texas will in no way further the Texas judicial system's interest in efficient dispute resolution or the interests of the several states. Simply put, "Texas has no 'special' interest in granting relief to its citizens against a foreign corporation on a cause of action that arose under the laws

of a foreign government for conduct outside the United States." *Jones*, 954 F.2d at 1070.

### 3. Plaintiffs Have No Recognizable Interest in Litigating This Action in Texas.

Plaintiffs do not have any recognizable constitutional interest in adjudicating this controversy against Ruhrgas AG in Texas. Most of the evidence in this case, including that from witnesses, is in foreign countries, not Texas. Hoffmann Affidavit ¶¶ 10 & 13 (Ex. "B"). Plaintiffs have no legitimate interest in resolving this dispute in Texas.

### 4. Texas is Not a Convenient Forum.

Texas is not the site for the most efficient judicial resolution of the controversy. Most of the witnesses and evidence are located outside of Texas. Hoffmann Affidavit ¶¶ 10 & 13 (Ex. "B"). Thus, not only would Ruhrgas AG be forced to travel great distances to defend this action in Texas, numerous documents and witnesses would have to be transported here from Europe. *Id.* ¶¶ 10, 13. It would be inefficient and burdensome to conduct discovery and a trial in Texas when many of the witnesses and evidence are far outside the state. *Id.* ¶¶ 10, 11 & 13. This dispute would be more efficiently resolved where the evidence and the witnesses are located. *See Brand v. Menlove Dodge*, 796 F.2d at 1075 ("The site where the events in question took place or where most of the evidence is located usually will be the most efficient forum.").



### 5. Europe has a Greater Interest in this Suit.

Finally, other forums have a much stronger interest in this dispute than Texas does. It is important to consider "the interests of the 'several States,' . . . in the efficient judicial resolution of the dispute and the advancement of substantive policies." *Asahi*, 480 U.S. at 115. The interests of other nations must also be considered. *See id.* at 115-16; *Guardian Royal Exchange Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 229 (Tex. 1991). For example, Norway has a direct interest in this litigation given the allegations that its state-owned oil company, Statoil, engaged in wrongful conduct. This directly implies allegations against the government of Norway itself. Norway also has a direct interest in this litigation given the fact that Norway's natural resources are the subject of the underlying transaction. Europe has a stronger interest than Texas regarding allegations of a "conspiracy . . . to monopolize the Western European market for natural gas." First Amended Petition ¶ 6. Europe has a strong interest in the reliability of natural gas agreements and the security of supply, which is one of the main concerns of the European Energy Policy. Clearly, the interests of Europe are more directly and substantially implicated than those of Texas.

As the court in *Bearry* concluded, "all states have an interest in predictability of jurisdiction, in a legal system that allows the citizens of those states to structure their transactions to limit their amenability to suits in foreign states." 818 F.2d at 377. Allowing jurisdiction over Ruhrgas AG in Texas in this case would subvert the interests of Germany, as well as the due process rights of

Ruhrgas AG. As the Fifth Circuit stated, "when the cause of action is unrelated to the nonresident's slight activity within the forum, . . . the constitutionality of jurisdiction is least likely." ***Prejean v. Sonatrach,*** 652 F.2d 1260, 1265 n.4 (5th Cir. Unit A Aug. 1981).

In sum, even if Plaintiffs can establish "minimum contacts" of Ruhrgas AG with Texas, the exercise of personal jurisdiction over it would not be fair or reasonable and would offend traditional notions of fair play and substantial justice. ***Villar,*** 780 F. Supp. at 1475.

## V.

## PLAINTIFFS' FAILURE TO PROPERLY SERVE RUHRGAS AG REQUIRES DISMISSAL

Pursuant to Rule 12(b)(4) and (b)(5) of the FEDERAL RULES OF CIVIL PROCEDURE, subject to and without waiver of its previously filed Motion to Dismiss for lack of personal jurisdiction, Ruhrgas AG has moved to dismiss the Plaintiffs' claims for failure to effect service of process or, alternatively, to quash service of process. When service of process is challenged, the party on whose behalf service is made has the burden of establishing its validity. ***Familia de Boom v. Arosa Mercantil, SA.,*** 629 F.2d 1134, 1139 (5th Cir. 1980), *cert. denied,* 451 U.S. 1008 (1981). Plaintiffs cannot meet this burden in two respects. First, Plaintiffs have failed to serve Ruhrgas AG through the proper German central authority as required by the Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 361,



T.I.A.S. No. 6638 (Nov. 15, 1965) ("Hague Service Convention") (Ex. "F"). Second, Plaintiffs have not served a version of their Original or First Amended Petition translated into German as required by the Hague Service Convention.

### A. Plaintiffs Failed to Serve Ruhrgas AG through German Central Authority.

The Hague Service Convention requires each signatory country to establish a central authority to receive requests for service of judicial documents and proceedings in other countries and to serve such documents in a manner that is authorized by or consistent with local laws. ***Volkswagenwerk AG v. Schlunk,*** 486 U.S. 694, 698 (1988); Hague Service Convention, art. 5 (Ex. "F"). In ***Volkswagenwerk AG v. Schlunk,*** the Supreme Court endorsed the view that compliance with the Hague Service Convention is required when serving process in countries that are parties to the Convention:

> By virtue of the Supremacy Clause, U.S. Const. Art. VI, the [Hague Service] Convention preempts inconsistent methods of service prescribed by state law in all cases to which it applies.

***Volkswagenwerk,*** 486 U.S. at 699 (noting that the Hague Service Convention did not apply in that case because the defendant was a domestic corporation owned by a foreign corporation); ***see also Vorhees v. Fischer & Krecke,*** 697 F.2d 574, 575 n. 1 (4th Cir. 1983) ("The broad scope of the treaty is clearly stated. The convention is to apply 'in all cases, in civil or commercial matters, where there is

occasion to transmit a judicial or extrajudicial document for service abroad.' ") (citing Hague Service Convention, art. 1). Both Germany and the United States have ratified or acceded to the Convention. ***Volkswagenwerk,*** 486 U.S. at 698.

Article 10 of the Hague Service Convention enumerates alternative channels for the transmission of judicial documents without resort to the central authority. Specifically, article 10 of the Hague Convention permits the following:

> ***Provided the State of destination does not object, the present Convention shall not interfere with –***
>
> (a) the freedom to send judicial documents, by postal channels, directly to persons abroad,
>
> (b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,
>
> (c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Hague Service Convention art. 10 (emphasis added) (Ex. "F"). Germany has expressly objected to service under article 10. Hague Service Convention n.10, at 43 (Ex. "F"); *Vorhees*, 697 F.2d at 575. Plaintiffs have not served Ruhrgas AG through the Hague Service Convention as they purport to do, *see* Original Petition and First



Amended Petition ¶ 4. Plaintiffs have attempted to serve Ruhrgas AG through the Texas Secretary of State. First Amended Petition ¶ 4. Because Germany has expressly objected to such service, Plaintiffs' service of process is ineffective.

### B. Plaintiffs Have Failed to Serve a Copy of the Petition in German.

The Hague Service Convention provides that although the request shall be written in either English, French or the official language of the State in which the documents originate, the "Central Authority may require the document [to be served] to be written in, or translated into, the official language or one of the official languages of the State addressed." Hague Service Convention, art. 5.

Germany is one of the countries that has such a requirement. ***Vorhees,*** 697 F.2d at 575 (noting that served documents must be translated into German); ***Lyman Steel Corp. v. Ferrostaal Metals Corp.,*** 747 F. Supp. 389, 400 (N.D. Ohio 1990) ("West Germany also requires the translation of documents sought to be served for its nationals."). The German resolution enacting the Hague Convention states as follows: "Formal Service (paragraph 1 of Article 5 of the Convention) shall be permissible only if the document to be served is written in or translated into the German language." Annex to the Convention. Ex. "F" at 42; ***Lyman Steel,*** 747 F. Supp. at 400 n.14. Plaintiffs themselves expressly mention the requirement of translation in paragraph 4 of their Original Petition and First Amended Petition, but Plaintiffs have failed to comply with this requirement. Because Plaintiffs have not served

a translated copy of the Original Petition or the First Amended Petition, they have not complied with the Hague Service Convention. Therefore, service of process has not been properly effected upon Ruhrgas AG, and Plaintiffs' action should be dismissed, or, service of process should be quashed.

## VI.

## CONCLUSION

Plaintiffs' claims do not arise out of any contacts of Ruhrgas AG with Texas. Nor does Ruhrgas AG have systematic and continuous contacts with Texas. Further, the exercise of jurisdiction in this case would offend notions of fair play and substantial justice. The United States Supreme Court has clearly spoken:

> Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.

***Asahi Metal,*** 480 U.S. at 115. Plaintiffs' claims should be dismissed because the Court lacks personal jurisdiction over Ruhrgas AG.

Moreover, Plaintiffs have failed in two respects to serve Ruhrgas AG properly under the Hague Service Convention. Ruhrgas AG was not served through the proper German authority, and neither the Original Petition nor the First Amended Petition were translated into German.

For all the foregoing reasons, Ruhrgas AG respectfully requests that (1) the Court dismiss for lack of personal jurisdiction over Ruhrgas AG; and (2) subject to the



Court's ruling on personal jurisdiction and without waiving same, the Court dismiss Plaintiffs' claims pursuant to 12(b)(4) and (b)(5) or quash service on Ruhrgas AG.

Respectfully submitted,

/s/ Ben H. Sheppard, Jr.
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served on counsel of record for Plaintiffs by certified mail, return receipt requested this 28th day of August, 1995.

/s/ Ben H. Sheppard, Jr.
BEN H. SHEPPARD, JR.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| MARATHON OIL COMPANY, MARATHON INTERNATIONAL OIL COMPANY, and MARATHON PETROLEUM NORGE A/S, | § | CIVIL ACTION NO. H-95-4176 |
| Plaintiffs, | § | |
| VS. | § | |
| RUHRGAS, A.G., | § | |
| Defendant. | § | |

**PLAINTIFFS' MOTION TO REMAND**

Pursuant to 28 U.S.C. § 1447(c), Marathon Oil Company ("Marathon"), Marathon International Oil Company, and Marathon Petroleum Norge A/S ("Norge"), collectively "Plaintiffs," respectfully urge this Court to remand this action to Texas state court for the following reasons.

1. Plaintiffs filed this action against Defendant Ruhrgas in Texas state court on July 6, 1995. Ruhrgas filed its notice of removal under 28 U.S.C. § 1446(a) on August 21, 1995, thereby removing the case to this Court. This motion to remand was filed within thirty days of Defendant's filing of its notice of removal.

2. Plaintiffs move the Court to remand the case to the 152nd Judicial District Court of Harris County, Texas (the court in which this action originally was filed)

because this Court lacks subject matter jurisdiction over the dispute.

3. This motion is based on the well-pleaded allegations of Plaintiffs' Original and First Amended Petitions; the Affidavits of Finn Engzelius, William F. Schwind, Jr. and John Evans (attached as Exhibit 1-3); the Brief filed in support of this motion; and other competent evidence on file in this matter.

4. Defendants have alleged three bases supporting their removal of this action: federal question jurisdiction under 28 U.S.C. § 1331, diversity jurisdiction under 28 U.S.C. § 1332, and the remand provisions under the Convention on the Recognition of Arbitral Awards, 9 U.S.C. § 201-08 (the "Convention"). None of these statutory provisions apply to the facts of this case.

5. Plaintiffs have not stated any federal claims in their Original or First Amended Petitions. To the contrary, Plaintiffs' Petition relies exclusively on (state) common law claims of fraud, tortious interference, participation in breach of fiduciary duty, constructive fraud, and civil conspiracy.

6. Plaintiffs have not sued a foreign state; thus the Foreign Sovereign Immunities Act (*see* 28 U.S.C. § 1441(d)) has no application. Ruhrgas is a private German corporation that is not state owned or controlled. Ruhrgas has not attempted to join as a party any foreign sovereign, and even if it did, the option to remove a portion of the case would belong to the sovereign alone, not to Ruhrgas. There is no federal common law right of removal for actions involving foreign corporations, and there is no federal removal statute that permits removal



simply because some of the facts relate to a foreign sovereign – especially when that sovereign is not even a party to the lawsuit.

7. There is no diversity of citizenship jurisdiction in this case; both Defendant Ruhrgas and Plaintiff Norge are aliens. Norge is the holder of a license to produce gas in the Heimdal gas field, has enforceable rights under applicable law, and is entitled to protect the value of its license and its portion of the unsold gas remaining in the field. Norge's interest in the Heimdal gas field has been damaged by Ruhrgas' actions, and accordingly, Norge has much more than a mere "possibility of recovery" in this case. Clearly, Norge is a proper plaintiff.

8. The Convention on Recognition and Enforcement of Foreign Arbitral Awards has no application here because this action does not seek to enforce a foreign arbitration award, nor does it primarily center on the interpretation of a foreign arbitration agreement. To the contrary, none of the Plaintiffs are parties to any sort of agreement (arbitration or otherwise) with Defendant, which Ruhrgas concedes in the Declarations filed in support of its notice of removal. For this reason alone, the Convention has no application to this action. Furthermore, none of the Plaintiffs have ever consented to arbitrate the claims at issue in this case, nor have they waived their U.S. and Texas constitutional rights to seek redress in the courts. The arbitration provision to which Ruhrgas often refers is strictly between Ruhrgas and Marathon Petroleum Company (Norway) ("MPCN"), which is a separate and distinct corporation from the Plaintiffs. Although a Marathon affiliate, MPCN is *not* a party to this case, is not seeking any relief in this action, and has

never purported to bind Plaintiffs to any arbitration agreement.

9. As is more fully set forth in the Brief filed in support of this Motion, none of Defendant's bases for removal have any support in law or fact. Accordingly, pursuant to 28 U.S.C. § 1447(c), Plaintiffs request that the case be remanded and that the Court award them their costs and expenses (including attorneys' fees) incurred as a result of Defendant's removal.

**WHEREFORE,** Plaintiffs respectfully urge the Court to remand this cause to the state forum from which it was removed, to award Plaintiffs their costs and expenses, and to grant them any other relief to which they are entitled.

Respectfully submitted,

/s/ Clifton T. Hutchinson
w/permission by GT
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**CERTIFICATE OF CONFERENCE**

Counsel for Plaintiffs has conferred with Defendant's counsel regarding the substance of this motion. No agreement could be reached regarding the motion's disposition, so the matter is presented to the Court for determination.

/s/

**CERTIFICATE OF SERVICE**

A copy of this document was served on Defendant's attorneys of record in accordance with Federal Rule of Civil Procedure 5, on September 14, 1995.

/s/

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

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|---|---|---|
| MARATHON OIL COMPANY, MARATHON INTERNATIONAL OIL COMPANY, and MARATHON PETROLEUM NORGE A/S | ) | CIVIL ACTION NO. H-95-4176 |
| Plaintiffs, | ) | |
| v. | ) | |
| RUHRGAS, A.G., | ) | |
| Defendant. | ) | |

**PLAINTIFF'S BRIEF IN SUPPORT OF THEIR MOTION TO REMAND**

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MARATHON PETROLEUM
NORGE A/S



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| Plaintiffs, | ) | |
| v. | ) | |
| RUHRGAS, A.G., | ) | |
| Defendant. | ) | |

**PLAINTIFF'S BRIEF IN SUPPORT OF THEIR MOTION TO REMAND**

Plaintiffs Marathon Oil Company ("Marathon"), Marathon International Oil Company ("MIOC") and Marathon Petroleum Norge A/S ("Norge") submit the following brief in support of their motion to remand this action to Texas state court.



**SUMMARY OF ARGUMENT**

Defendant Ruhrgas, A.G. ("Ruhrgas"), a private German gas company, improvidently removed this case to federal court. This Court lacks subject matter jurisdiction over the action and should remand the case to the Texas state forum originally chosen by the Plaintiffs.

In an effort to make this case appear to be removable, Ruhrgas has blatantly mischaracterized the nature of the action. First of all, this case is *not* an attempt to recover tort damages "arising out of an agreement" between Ruhrgas and Marathon Petroleum Company (Norway) ("MPCN"). To the contrary, MPCN, although a Marathon affiliate, *is not a party to this case and is not seeking damages in this action*. None of the causes of action alleged in this case are based on Ruhrgas' contract with MPCN. Instead, this case is about (1) Ruhrgas' fraud in inducing Marathon and MIOC to finance the Heimdal gas field's development, and (2) Norge's attempt to recover the lost value of its license to produce Heimdal gas to the extent that loss was due to Ruhrgas' interference and other wrongful conduct.

Second, none of the Plaintiffs are parties to any sort of arbitration agreement with Ruhrgas, and none have ever consented to arbitrate any of the claims at issue in this action. The arbitration provision to which Ruhrgas constantly refers is contained in its agreement with *MPCN*. The terms of that unrelated arbitration provision expressly apply, as one would expect, *only* to the parties to that contract – none of whom are plaintiffs in this case. Ruhrgas concedes, as it must, that it has no agreements (arbitration or otherwise) with any of the Plaintiffs. The

damages being sought by the Plaintiffs here do not flow from the fact that MPCN is a Marathon affiliate; instead, Plaintiffs' damages flow entirely from Ruhrgas' own wrongful actions directed towards them. All of Plaintiffs' claims still would exist even if MPCN had never entered a contract with Ruhrgas.

Given that both Norge and Ruhrgas are subjects of foreign states under the rules governing diversity jurisdiction, there is not complete diversity in this case. Contrary to Ruhrgas' desperate and bold assertion, Norge has not been "fraudulently joined." Norge holds a license to produce gas in the Heimdal field and plainly has an interest in the subject matter of this case sufficient to satisfy any standard governing proper joinder.

Finally, the fact that Statoil has conspired with Ruhrgas to harm Plaintiffs in no way creates federal question jurisdiction. Statoil may be the Norwegian state-owned gas company, but it is *not* a party to this case. Ruhrgas is a privately-held German corporation. It is *not* state-owned, and it is not entitled under any federal statute to remove this case to federal court.

## BACKGROUND

The factual background concerning this case is set out in detail in Plaintiffs' Petition. Rather than repeat those facts at length, Plaintiffs will summarize the facts bearing most directly on this motion.

Marathon indirectly acquired an interest in the Heimdal natural gas field in the 1970's when it acquired Pan Ocean Oil, Ltd. and its Norwegian affiliates. At the time,



Pan Ocean Oil Norge A/S held a Production License for the Heimdal gas field. That company was re-named Marathon Petroleum Norge A/S ("Norge") and has held the Production License ever since. The largest interest holder in the Heimdal gas field is Statoil, the Norwegian state-owned oil and gas company with whom Plaintiffs allege Ruhrgas has conspired to gain monopoly power.

The first development proposal for the Heimdal field called for the field to be connected to a British pipeline so that gas from the field could be transported to Great Britain. At the time, Marathon and Norge did not know that Statoil was jointly conspiring with Ruhrgas and a Ruhrgas-led consortium of European gas buyers to monopolize the Western European gas market. Subsequently, Statoil insisted that the Heimdal venturers scuttle the existing plans to hook up to a British pipeline and instead support the construction of a longer pipeline to connect Heimdal and other North Sea fields to Western Europe via a Ruhrgas-owned facility in Emden, Germany. To induce Marathon and MIOC to fund the development of the Heimdal field, Ruhrgas represented to Marathon that it would pay a premium price for Heimdal gas (as would its consortium partners) if the pipeline to Emden was constructed and Marathon (through MIOC or otherwise) advanced the necessary funds to its affiliates operating in Norway (Norge and/or MPCN) to enable the Heimdal field to be developed. Based on these and other assurances, Marathon and MIOC advanced hundreds of millions of dollars to such affiliates.

Although none of the Plaintiffs knew it, Ruhrgas never intended to pay a premium price for Heimdal gas. Instead, it only promised to pay such a price to induce

Marathon and MIOC to fund the Heimdal venture, including the construction and operation of a pipeline to Emden. Once Heimdal was connected to Ruhrgas' Emden facility, MPCN had no other means of selling Norge's gas to anyone other than Ruhrgas and its consortium. Ultimately, Ruhrgas refused to pay the promised premium price, and MPCN (the Marathon affiliate through which Heimdal's development and its attendant gas sales were accomplished) had no means of repaying the advances made to it by Marathon and MIOC. Marathon and MIOC now have suffered tremendous resulting losses. Given that none of the advances would have been made but for Ruhrgas' misrepresentations, Marathon and MIOC have filed this lawsuit to, among other things, recover damages for Ruhrgas' fraud.

Norge still holds the Production License to the Heimdal field. This license gives Norge the right to a portion of all Heimdal reserves, and includes the rights (and related obligations) to extract and sell Heimdal gas. Since 1975, Norge's rights to conduct development and sales operations have been assigned via a Pass Through Agreement to MPCN, who in turn contracted to sell Heimdal gas to Ruhrgas and its fellow consortium members. Norge did not, however, assign all of its interests in the Production License to MPCN; it continued to hold the license, retained a reversionary or remainder interest in all assigned rights under the license, remained liable to the Norwegian government under the license, and retained ownership of unsold gas in the Heimdal field.

MPCN recently advised Norge that it has given the required notice to terminate its gas sales contract with Ruhrgas next year. Once MPCN terminates its Gas Sales



Contract, its interest in the Production License will revert back to Norge because MPCN will be unable to fulfill its obligations under the Pass Through Agreement. Ruhrgas is currently refusing to permit any purchaser who does not belong to the Ruhrgas consortium to access the Heimdal gas flowing into Ruhrgas' facility in Emden, thereby preventing Norge from securing another buyer for the Heimdal gas. In this suit, Norge is seeking damages for this tortious interference, and for the lost value of its Heimdal license attributable to Ruhrgas' conduct.

Thus, this case is not about Ruhrgas' contract with MPCN as Ruhrgas would lead the Court believe. Instead, it concerns Ruhrgas' fraud that induced Marathon and MIOC initially to advance funds for the Heimdal project, its continuing fraud that induced Marathon and MIOC to continue that funding, and its interference with Norge's ability to realize the value of its license. To be sure, Ruhrgas has inflicted substantial contractual damage upon MPCN as well, but that is not the subject of this action. None of the Plaintiffs are asserting any contract claims, none are seeking a contract measure of damages, and none are making any claims on MPCN's behalf.

## ARGUMENT

It is elementary that this Court's subject matter jurisdiction is controlled by Congress. *Yakus v. United States*, 321 U.S. 414 (1944). As Professors Wright and Miller note in opening their chapter on removal, "The right to remove a case from state to federal court is purely statutory and therefore is entirely dependent on the will of Congress." 14A Charles A. Wright, et al., *Federal Practice & Procedure* § 3721 (1985) ("Wright & Miller"); *Leffall v.*

*Dallas Indep. School Dist.*, 28 F.3d 521, 524 (5th Cir. 1994) ("removal is an issue of statutory construction"); *Garg v. Narron*, 710 F.Supp. 1116, 1118 (S.D. Tex. 1989). Indeed, there is long, unbroken, and uniform agreement on this point among the courts. *Nolan v. Boeig, Co.*, 919 F.2d 1058, 1064 (5th Cir. 1990); *Finn v. American Fire & Gas. Co.*, 207 F.2d 113, 115 (5th Cir. 1953) ("The removal jurisdiction at the United States district courts is purely statutory"), *cert. denied*, 347 U.S. 912 (1954). Accordingly, unless some federal removal statute can be properly interpreted as providing the Court with subject matter jurisdiction over this proceeding, the case must be remanded. As should be obvious from Plaintiff's Petition, and as is further demonstrated below, there is no basis whatsoever for federal subject matter jurisdiction over this case.

## I. THE CONTROLLING STANDARD

Aware of the increasing pressure on the federal docket and the great deference that should be afforded to a Plaintiff's choice of forum, Congress has expressly provided limited removal jurisdiction, and the federal courts (including the Fifth Circuit) uniformly have held that "[r]emoval statutes are to be strictly construed against removal." *Leffall*, 28 F.3d at 524; *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941). Two other reasons are often cited in support of this rule. First, "the exercise of removal jurisdiction – particularly in diversity cases – is in derogation of state sovereignty." *Thompson v. Gillen*, 491 F.Supp. 24, 26 (E.D. Va. 1980) (citations omitted); *accord Shamrock*, 313 U.S. at 109; *United States ex rel. Walker v. Gunn*, 511 F.2d 1024, 1027 (9th Cir.) *cert. denied*,



423 U.S. 849 (1975); *Oltremari v. Kansas Social & Rehabilitative Serv.*, 871 F.Supp. 1331, 1343 (D. Kan. 1994).[1] Second, removal also is disfavored because it creates the possibility that the parties and the court could try the case to final judgment only to discover that there was no valid basis for federal jurisdiction. *See e.g., Vasquez v. Alto Bonito Gravel Plant Corp.*, 56 F.3d 689, 694 (5th Cir. 1995) (ordering remand after case had been fully tried); *Thompson*, 491 F.Supp. at 26; 14A *Wright & Miller* § 3739.

In light of the strictures governing removal, federal courts have consistently held that the "burden is on the party seeking to preserve the removal, not the party moving for remand, to show that the requirements for removal have been met." 14A *Wright & Miller* § 3739 at 574; *Asociacion Nacional de Pescadores v. Dow Quimica De Columbia*, 988 F.2d 559, 563 (5th Cir. 1993); *Garg*, 710 F. Supp. at 1117. Likewise, " [w]hen there is doubt as to the right of removal in the first instance, ambiguities are to be construed against removal." *Production Stamping*, 829 F.Supp at 1075; *Lackey v. ARCO*, 990 F.2d 202, 206 (5th Cir. 1993); *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. 1981); *Oltremari*, 871 F.Supp. at 1342; 14A *Wright & Miller* § 3739, at 584. When considering a motion to remand, the Court need not look beyond the facts as pleaded in the Petition, but in any event, the Court "should . . . resolve all disputed questions of fact in favor of the plaintiff." *Burden v. General Dynamics Corp.*, 60 F.3d 213, 217 (5th Cir. 1995). Once the Court applies these

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[1] *See also Production Stamping Corp. v. Maryland Casualty Co.*, 829 F.Supp. 1074, 1075 (E.D. Wis. 1993).

rules and resolves all disputed questions of fact in Plaintiffs' favor, it is readily apparent that this case should be remanded.

## II. THERE IS NO FEDERAL QUESTION JURISDICTION

### A. Plaintiffs Have Not Stated Any Federal Claims.

The Petition in this case certainly does not state any claim, in the words of 28 U.S.C. § 1441(b), "arising under the Constitution, treaties or laws of the United States." Even a cursory reading of the Petition reveals that its causes of action are confined exclusively to common-law fraud and tort claims arising out of Ruhrgas' conduct directed towards each of the Plaintiffs. Namely, the Petition alleges that Ruhrgas fraudulently induced Marathon and MIOC to loan their affiliate millions of dollars to help fund the development of the Heimdal gas field. Ruhrgas induced Marathon and MIOC to loan these funds by making promises it never intended to keep, by failing to disclose its on-going conspiracy to monopolize the relevant market, and by making several material misrepresentations. Based on the facts alleged in the Petition, Plaintiffs are pursuing the following state common-law causes of action seeking redress for the damages visited upon them by Ruhrgas: (1) fraud; (2) tortious interference; (3) participation in breach of fiduciary duty; (4) constructive fraud; and (5) civil conspiracy. None of these claims are grounded in federal law, and none "arise under the Constitution, treaties or laws of the United States."



### B. There Is No Claim Against A Foreign Sovereign.

In the apparent hope of creating a federal question where none exists, Ruhrgas sheepishly argues that because it is a foreign corporation, and because its joint tortfeasor, Statoil, allegedly is a foreign sovereign, there must be federal question jurisdiction because the claims supposedly require the "resolution of international relations law." Nothing in Plaintiffs' Petition, however, requests (much less requires) the resolution of some amorphous "international relations law." While it is true that Congress has provided a limited basis for removal of cases involving foreign sovereigns, that provision limits removal to cases actually "**brought in a state court against a foreign state.**" 28 U.S.C. § 1441(d). It does not, as Ruhrgas implies, extend to any case in which the defendant asserts that "the interest of foreign countries" are somehow "affected." *See Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 841 (1989); *Delgado v. Shell Oil Co.*, 890 F.Supp. 1324, 1348-49 (S.D. Tex. 1995). Instead, the statute means precisely what it says. *See, e.g., Williams v. M/V Sonora*, 985 F.2d 808, 810-11 (5th Cir. 1993) (absence of foreign sovereign precludes this jurisdictional basis). A claim must actually be "brought" against the sovereign in state court before removal would be authorized, and even then, only the foreign sovereign would have the option to remove the case. *See, e.g., Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1375 (5th Cir. 1980).

The Plaintiffs have not brought any claims against Statoil or any other supposed foreign sovereign with whom Ruhrgas may have conspired to control the market

for North Sea gas. While both the Texas and federal rules might permit Ruhrgas to join its joint tortfeasors, Ruhrgas has not filed any such third-party action against Statoil. *See*, Fed. R. Civ. P. 14. Hence, Statoil has not crossed the obvious bright line drawn in 28 U.S.C. § 1441 (d) – it *is not a party* to this action and will remain a non-party unless someone sues it.

Statoil's involvement in some of the underlying facts does not, in itself, provide a congressionally authorized basis for removal by Ruhrgas. *See Williams*, 985 F.2d at 811. Any argument to the effect that the mere involvement of a non-party foreign sovereign in some of the facts of a case is sufficient to create removal jurisdiction would twist the plain language of Section 1441(d) beyond all reasonable limits. Ruhrgas' implication that there is some as yet undefined federal common law source of federal removal jurisdiction is patently meritless. *Martin v. Hunter's Lessee*, 14 U.S. (I Wheat) 304 (1816); *see also American Fire & Casualty Co. v. Finn*, 311 U.S. 6 (1951) ("jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation"); *Finn*, 207 F.2d at 115.[2]

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[2] Ruhrgas cites two cases in support of its assertion of a free-wheeling "international issues" basis for removal jurisdiction. In *Kern v. Jeppesen Sanderson, Inc.*, 867 F.Supp. 525 (S.D. Tex. 1994), the plaintiff's well-pleaded complaint arose under a federal treaty, thereby clearly creating a federal question. In *Sequihua v. Texaco, Inc.*, 847 F.Supp. 61, 62-63 (S.D. Tex. 1994), the plaintiffs were residents of a foreign country. They sought a decree which would have required a transfer of title to real property located in a foreign nation, which spurred a formal protest from that country's government. In short, there was no state interest in the claim and, instead, the claim directly affected the United States' foreign relations. By contrast, two of the Plaintiffs in this case are Texas residents; one is a Norwegian corporation. Many of the representations at the heart of this case were made in Texas, either by telex, telephone, or in person. The State of Texas, as a sovereign, has a strong interest at stake in cases in which residents of foreign nations have committed torts against its citizens, and within its borders. *E.g.*, *Thompson*, 491 F.Supp. at 26.



### C. Plaintiffs Are Not Parties To The MPCN/ Ruhrgas Arbitration Agreement.

As its final basis for federal question jurisdiction, Ruhrgas points to the arbitration clause in its Gas Sales Contract with MPCN (a non-party), which requires MPCN to submit certain disputes with Ruhrgas to arbitration. While international arbitration awards and disputes centering on arbitration agreements may in some cases give rise to a separate and independent basis for removal (*see infra* at Section III), the presence of an arbitration clause in a contract between Ruhrgas and a non-party affiliate of Plaintiffs does not transform Plaintiffs' state law claims into federal questions. *Prudential-Bache Securities, Inc. v. Fitch*, 966 F.2d 981, 989 (5th Cir. 1992) (claim to compel arbitration under the Federal Arbitration Act is not a basis for federal jurisdiction).

In sum, the asserted bases for federal question jurisdiction in this case are nothing but shadows without substance. As a result, nothing in 28 U.S.C. § 1331 provides this Court with subject matter jurisdiction over this action.

## III. THE 1985 GAS SALES CONTRACT BETWEEN RUHRGAS AND MPCN DOES NOT CREATE AN INDEPENDENT BASIS FOR REMOVAL

Ruhrgas urges that its Gas Sales Contract with a non-party creates a separate and independent basis for removal under legislation implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. 9 U.S.C. §§ 201-208 (1994) (the "Convention").

### A. The Convention's Own Terms Confirm That It Does Not Apply.

The Convention, by its express terms, requires that there be *"an agreement in writing* under which *the parties* undertake to submit to arbitration all or any differences." Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. II, 3 U.S.T. 2517. The Convention defines "agreement in writing" as an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." Thus, under the Convention, as elsewhere, arbitration is strictly "a creature of contract." *National Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326, 334 (5th Cir. 1987). Unless, the parties have come to an agreement in writing to arbitrate, the Convention and the legislation implementing it provide no basis for federal jurisdiction. *Sphere Drake Ins. PLC v. Marine Towing*, 16 F.3d 666, 669 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 195 (1994); *International Shipping Co., S.A. v. Hydra Offshore, Inc.*, 675 F. Supp. 146 (S.D.N.Y. 1987), *aff'd*, 875 F.2d 388 (2d Cir.), *cert. denied*, 493 U.S. 1003 (1989) (only parties to contract containing arbitration clause can be compelled to



arbitrate under the Convention). Because the none of the plaintiffs have consented to arbitration, much less done so in writing, the Convention has no conceivable application here.

### B. The MPCN/Ruhrgas Arbitration Clause Applies Only To The Parties To The 1985 Gas Sales Contract.

#### 1. A party cannot be compelled to arbitrate absent consent.

Quite apart from any technical writing requirements, it is beyond dispute as a general matter of federal constitutional law that a party cannot be compelled to arbitrate a claim unless it has knowingly consented to arbitration at some point. As the Supreme Court has repeatedly warned, *"the law compels a party to submit to arbitration only if he has contracted do so." Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190. 200 (1991) (quoting *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 374 (1974)); *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S.Ct. 1212, 1216 (1995) ("arbitration is a matter of consent, not coercion").[3] A court cannot compel a party to arbitrate his claims simply because it seems like a good idea to his opponent. *United States v. Paramount Pictures, Inc.*, 334 F.2d 131, 176 (1948); *see also Moses H. Cone*, 460 U.S. at 19-20.

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[3] *Accord Volt Info. Serv., Inc. v. Board of Trustees*, 489 U.S. 468, 478 (1989); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985); *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 19-20 (1983); *Britton v. Coop Banking Group*, 4 F.3d 742, 744 (9th Cir. 1993); *Ashland Oil*, 817 F.2d at 334.

The Supreme Court and the Fifth Circuit have unequivocally recognized a fundamental constitutional right of access to the courts in civil cases under the First Amendment's Petition Clause and the Due Process Clauses of the Fifth and Fourteenth Amendments. *California Motor Trans. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (First Amendment); *Bodie v. Connecticut*, 401 U.S. 371, 377 (1971) (due process); *Jackson v. Procunier*, 789 F.2d 307, 310-11 (5th Cir. 1980); *accord Hoeber ex rel. NLRB v. United Slate Tile & Composition Roofers Damp & Waterproof Workers Ass'n*, 939 F.2d 118, 126 (3rd Cir. 1991). Likewise, the Texas Constitution guarantees its citizens essentially unfettered access to the state's courts. *E.g.*, Tex. Const. art. 1, § 13 ("All courts shall be open, and every person for an injury done him, in his lands, goods person or reputation, shall have remedy by due course of law."); *id.* art. V, § 10 (right to trial by jury in civil cases).

The first question for the Court, therefore is whether any of the Plaintiffs ever have consented to arbitrate the claims made in this case, thereby waiving their right to bring the claims in state or federal court. *Volt Info Serv.*, 489 U.S. at 478; *Executone Information Sys., Inc. v. Davis*, 26 F.3d 1314 (5th Cir. 1994); *B.V. v. M.V. Sea Cattleya*, 852 F. Supp. 6, 8 (S.D.N.Y. 1994) (first question under Convention is whether the parties have agreed in writing); *Jones v. Sea Towing Serv. v. Freeport, N.Y. Inc.*, 828 F. Supp. 1002, 1015 (E.D.N.Y 1993) (same; requiring arbitration), *rev'd*, 30 F.3d 360 (2d Cir. 1994). Ruhrgas claims the arbitration clause in its Gas Sales Contract with MPCN (an entirely different corporation) effectively eliminates any requirement of consent of the Plaintiffs; but a simple analysis of that contract reveals that its arbitration provision has



absolutely nothing to do with the Plaintiffs or their claims.

**2. Plaintiffs are not parties to any arbitration agreement with Ruhrgas.**

Ruhrgas itself notes in its Notice of Removal that its Gas Sales Contract is exclusively between Ruhrgas and MPCN, a distinct corporation that is not a party to this suit. *Ruhrgas concedes that it has no agreement whatsoever with any of the Plaintiffs:*

> **"Ruhrgas AG has never entered into any agreement with any of the plaintiffs concerning gas produced from the Heimdal field or any matters which are the subject of the First Amended Petition filed by the plaintiffs in this action."**

Declaration of Lutz K. Eckert at ¶ 5. Thus, Ruhrgas admits that Plaintiffs are not parties to its Gas Sales Contract with MPCN. Nevertheless, despite the admitted absence of a contract, Ruhrgas argues that the MPCN/ Ruhrgas arbitration clause should apply to Plaintiffs claims because the Plaintiffs are corporate affiliates of MPCN. In the first place, this argument complete fails to acknowledge any consent requirement, contractual or otherwise. Additionally, this argument fundamentally misperceives the law of corporations as well as the settled line of authority – which Ruhrgas completely ignores in its motions and supporting memoranda – holding that corporate parents are not bound by their wholly-owned subsidiaries' arbitration agreements. *E.g., Mowbray*, 795 F.2d at 1116; *Coltrain v. F.N. Wolf & Co., Inc.*, 818 F.Supp. 163, 163-64 (E.D. Va. 1993); *Gemco Latinoamerica, Inc. v.*

*Seiko, Time Corp.*, 671 F.Supp. 972 (S.D.N.Y. 1987) (corporate parents not bound by arbitration clause between their wholly-owned subsidiary and plaintiff); 1 *Fletcher of Encyclopedia of the Law of Private Corporations* § 43.85 (1990 Rev. ed.); 2 *Federal Arbitration Law* § 18.4 (1995). Obviously, the fact that corporations are affiliated does not mean that each of them assents to, and personally agrees to be bound by, the terms of the other's contracts.

The unambiguous terms of its Gas Sales Contract also indicate that neither Ruhrgas nor MPCN even purported (much less had the authority) to bind their parents or other corporate affiliates to the terms of that contract's arbitration provision. Tellingly, the contract's preamble does not define either "MPCN" or "Ruhrgas" to include their parents or affiliates. It does, however, acknowledge the existence of such corporations, and even goes so far as to define the term "Affiliate" to mean any parent corporation of the parties, and any corporation of which such parent owns at least 50% of the voting shares. *See* Gas Sales Contract, ¶ 1.1(3).

Having acknowledged and defined "Affiliates," the contract refers to the defined term "Affiliate" only twice: in ¶ 7.4 to provide that any independent consultant appointed by the Buyers cannot be an employee or "Affiliate" of the Buyers, and in ¶ 14.3.2 to provide that any appointed expert cannot be an employee or "Affiliate" of either party to the contract. Article 15, which contains the contract's arbitration provisions, does not purport to apply to any contracting party's "Affiliates."

If the parties to the Gas Sales Contract had intended for that agreement's terms to bind their Affiliates, as



Ruhrgas now claims, they certainly could have provided as much in the contract. Instead, they chose to specifically identify their Affiliates and then *exclude* any reference to them in any substantive contractual provision, including the arbitration provision. These provisions are unambiguous, and plainly exclude the Plaintiffs in this case by their own terms.[4] Even if there were some ambiguity, which there is not, the contract would have to be strictly construed *against* Ruhrgas, the contract's principal draftsman. *Mastrobuono*, 115 S. Ct. at 1219.

In short, nothing in the Gas Sales Contract remotely supports the notion that any contracting party's Affiliates assumed any obligation of any kind, or more importantly, that any non-signatory Affiliate consented to arbitration of any claims. *See Mowbray v. Moseley, Hallgarten, Estabrook & Weeden*, 795 F.2d 1111, 1116 (1st Cir. 1986) (finding arbitration provision inapplicable where parties to contract were aware of third-party but excluded third-party from arbitration clause); *Otto Wolf Hadelgesellschaft v. Sheridan Trans. Co.*, 800 F. Supp. 1353, 1357-58 (E.D. Va. 1992).

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[4] It is not surprising that the Gas Sales Contract did not purport to bind either party's Affiliates in any way. Like Marathon, Ruhrgas has many affiliates, and wanted to ensure that the contract at issue here would apply only to the signatories, and not their affiliated corporations. *See Mowbray*, 795 F.2d at 1116.

**3. Plaintiffs have not otherwise consented to arbitration.**

Thus, Ruhrgas has not met its burden of proving that the arbitration clause in its Gas Sales Contract with MPCN even applies to the Plaintiffs. Nor has it shown that Plaintiffs otherwise consented to arbitrate the claims at issue in this case. The simple and obvious fact is that Plaintiffs are different corporations and are entitled to being treated as such absent some basis for disregarding their corporate existence.[5] None of the Plaintiffs has ever consented to arbitrate its disputes with Ruhrgas, or to otherwise waive its right of access to the courts or to a trial by jury. *See Fuentes v. Shevin*, 407 U.S. 67, 94-96 (1972) (holding that waiver of constitutional right of access must "at the very *least* be clear"); *Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969) (canvassing rules regarding waiver of constitutional rights); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) (first question court must ask is whether parties have agreed to resolve disputes by arbitration); *Mowbray*, 795 F.2d at 1116.

To be sure, a corporation, or any other person, may consent to arbitration without signing a contract, although a signature on the contract is the most common and reliable manifestation of consent. But Ruhrgas has not demonstrated that any of the Plaintiffs have ever consented to arbitrate their claims against it. In its separate motion for stay pending arbitration, Ruhrgas cites a handful of cases from other jurisdictions in support of its

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[5] No such basis has even been alleged (much less proven), nor could it be alleged in good faith.



contention that claims may be submitted to arbitration without any contractual relationship. But Ruhrgas' argument confuses two distinct notions: the scope of a clause vis-a-vis the parties who have assented to it, and the antecedent question of who has agreed or consented to arbitration in the first place. Far from suggesting (much less holding) that a party can be denied access to the courts and compelled to arbitrate without ever consenting, Ruhrgas' authorities actually confirm the fundamental need for consent.

Ruhrgas' principal authority, the Fourth Circuit's decision in *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile S.A.*, 863 F.2d 315 (4th Cir. 1988), is as good an example as any. In that case, the Plaintiff, J.J. Ryan, an importer of goods, had entered into distribution contracts with four related corporations, each of which was a seller to Ryan. Each of the contracts contained an arbitration clause and concerned the sale of goods. When the sellers threatened to terminate their agreements with Ryan and offered to buy Ryan out, Ryan filed suit against all four of the parties with whom it had contracted as well as their corporate parent, Rhone, alleging a joint tort theory. With respect to the issues that could be submitted to arbitration, the court held that each of Ryan's claims fell within the scope of the arbitration clause.

The court then went on to explore Ryan's separate argument that his claim against the parent, Rhone, could not be submitted to arbitration even though Ryan alleged that the parent and affiliates were jointly liable for the identical claims. The court began its analysis by stressing that "[a]lthough Rhone was not a party to the distribution contracts, *it is willing to submit Ryan's disputes with it to*

*arbitration." Id.* at 320 (emphasis added). At no point did the court imply that Rhone could be denied access to the courts without its consent. Instead, it merely held that a party could agree to arbitration by consent in open court, and that a plaintiff who had already agreed to submit its claims to arbitration, under certain circumstances, could not prevent the joinder of additional parties in the arbitration concerning the same claims.[6] Critically, but not surprisingly, the court did not suggest or imply that a party could be forced to arbitrate a claim without ever manifesting consent in the first place. *See supra* at 12.

Likewise, each of the remaining cases cited by Ruhrgas founders under even the slightest scrutiny. To be sure, in some of the cases the court struggled with the breadth of a party's consent, but in every case, the party, under well-recognized rules of contract, had consented to submit its claims to arbitration For example, Ruhrgas cites *Foster v. Sears, Roebuck & Co.*, 837 F. Supp. 1006, 1008 (W.D. Mo. 1993). However, Ruhrgas fails to point out that the court actually reaffirmed that "arbitration is a matter of contract and a party cannot be required to arbitrate any claim he has not agreed to so submit." *Id.* at 1008. Ruhrgas also fails to mention that the plaintiff in that case admitted in his own complaint that he was a party to the

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[6] Ryan's claims against Rhone were based exclusively on his allegation that the defendants were joint tortfeasors. Thus, Ryan's action against Rhone concerned claims that he had already agreed to submit to arbitration, albeit against different parties. This case, of course, is entirely different: the Plaintiffs never have consented to arbitrate any of the claims in dispute with anyone, including Ruhrgas, and the Plaintiffs' claims are distinct from any claim that MPCN might have against Ruhrgas.



contract containing the clause. Likewise, in *McBro Planning & Development Co. v. Triangle Electrical Construction Co., Inc.*, 741 F.2d 342 (11th Cir. 1984), both the plaintiff and the defendant had agreed to submit their claims to arbitration.[7]

Far from abandoning the constitutional consent requirement, as Ruhrgas claims, the Fifth Circuit in *In re Talbott Big Foot, Inc.*, 887 F.2d 611, 614 (5th Cir. 1989), actually held in that the appellants *"[o]bviously . . . have not agreed to arbitrate their claims"* because they *"were not parties* to the [contract]." In a footnote, the court went on to opine in dicta that the question "would be closer" if the parties could be bound by the results obtained in each other's litigation.[8] But the court was careful to note that a

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[7] In *Ripmaster v. Toyoda Gosei, Co., Ltd.*, 824 F. Supp. 116 (E.D. Mich. 1993), the plaintiff was also a found to be an actual party to the contract. There, the defendant and the plaintiffs employer entered into a consulting contract calling for the plaintiff "to perform the services contemplated by the parties." Thus, the court held the plaintiff to be a party to the contract. The Gas Sales Contract contains no similar provisions regarding any of the Plaintiffs.

[8] In sum, Ruhrgas' bald assertion that the corporate affiliate relationship might give rise to some loose res judicata implications, even assuming the relevance of such considerations, is patently absurd *E.g., Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 410 (3d Cir. 1993) (joinder of corporate parent not required because judgment could not give rise to estoppel); *Hermes Automation Technology, Inc. v. Hyundai Elec. Indus., Inc.*, 915 F.2d 739, 750 (1st Cir. 1990); 18 *Wright & Miller* § 4460 at 533. It is hornbook law that issue and claim preclusion both require, at a minimum, that the same parties be involved and that the claims (or issues) be identical. *E.g., CIR v. Sunnen*, 333 U.S. 591 (1948) ("issues . . . must be identical in all

"mere alignment of interests," as here, "would be insufficient."

Lest there be any room for confusion, none of the Plaintiffs have consented to arbitrate any of the claims in this case, and in fact, Ruhrgas' contract with MPCN was drafted specifically to exclude that possibility. Moreover, none of the Plaintiffs consents to any such arbitration now. *See* Affidavits of John A. Evans, William F. Schwind, Jr., and Finn Engzelius, all of which are attached to Plaintiffs' Motion to Remand. Given the absence of any consent to arbitration, the Plaintiffs cannot be denied their constitutionally guaranteed access to the courts.

**C. Even Assuming For The Sake Of Argument That The Gas Sales Contract Could Provide Some Basis For Arbitration, The Claims In This Case Are Beyond The Scope Of The Arbitration Provision.**

Quite apart from the fact that none of these Plaintiffs have consented to arbitration or otherwise waived their right of access to the courts, the allegations of fraud in the inducement and related claims in this case have nothing to do with the subsequent Gas Sales Contract between Ruhrgas and MPCN. The subject matter of Marathon's and MIOC's claims are the initial and continuing inducements to invest, *not* the gas deal later struck between

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respects"). In this action, the Plaintiffs are different parties from MPCN, and their claims are entirely different from any MPCN could pursue. Accordingly, any final resolution of Plaintiffs tort claims could not, in any event, give rise to an estoppel of a subsequent contract dispute between Ruhrgas and MPCN.



MPCN and Ruhrgas. Likewise, Norge complains that the value of its license (*i.e.* the marketable value of gas that has not yet been extracted) has been destroyed by Ruhrgas' tortious interference and its monopolistic practices. All of Plaintiffs claims are based in tort, not contract, and none of those claims are based on Ruhrgas' Gas Sales Contract with MPCN in any way. To the contrary, all of Plaintiffs claims would exist *regardless* of whether Ruhrgas had ever entered a contract with MPCN.

Similarly, the damages sought by each Plaintiff are completely different from the contract expectancy damages MPCN might seek in a hypothetical dispute with Ruhrgas: Marathon and MIOC are seeking the amounts advanced to MPCN due to Ruhrgas' misrepresentations and fraudulent omissions, not the profit MPCN would have made had Ruhrgas honored its contract with MPCN. Norge is seeking the loss in value of its Production License, as well as damages associated with Ruhrgas' ongoing tortious interference with prospective business relationships between Norge and other potential gas buyers. Thus, even if the arbitration clause could somehow be applied to the Plaintiffs without their ever expressing assent to it, these claims still would not be arbitrable because they do not arise out of or relate to the Gas Sales Contract. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) (stressing that "a party cannot be required to submit to arbitration any dispute which it has not agreed to submit").

### D. Even Assuming For The Sake Of Argument That The Gas Sales Contract Could Provide Some Basis For Arbitration, It Would Not Provide A Basis For Removal.

Finally, even if the Gas Sales Contract had been signed by the Plaintiffs, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards still would not provide Ruhrgas with a statutory basis for removal.

The Convention is the "approximate . . . equivalent" of the Federal Arbitration Act, *McDermott Int'l. Inc. v. Lloyd's Underwriters of London*, 944 F.2d 1199, 1208 (5th Cir. 1991). The operative language of the Convention's removal provision states that a defendant may remove a case "[w]here the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award." To interpret this language, Plaintiffs submit that the Court should construe it in light of the Convention's purpose and the settled rule requiring strict construction against removal. *See Leffall*, 28 F.3d at 524. When so viewed, it is clear that Congress intended the Convention to permit removal only in two kinds of state court cases: those in which the plaintiff seeks enforcement of a foreign arbitral awards, and those cases in which the principal question is an interpretation of a foreign arbitration clause.[9]

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[9] Where, for example, a state court action is brought to determine where an arbitration is to occur, removal is proper. *E.g., McDermott*, 944 F.2d at 1200. In this way, foreign arbitration clauses are not subjected to varying interpretations in the fifty states. But this does not mean that every commercial case in which the defendant nakedly alleges that an arbitration provision has some tangential application may be resolved in federal court. Where the action is not directed at the clause itself, the risk of inconsistent rulings between the states is not so great, and resort to the federal courts is not unnecessary. If, as here, the parties do not even agree that the clause applies, the Court first should address that threshold question. There is no reason to assume that a federal forum will resolve this threshold question with any more consistency than the state courts.



This case presents neither situation. As is true of cases arising under the Federal Arbitration Act, the Court should not be drawn into convoluted arguments supporting the purported application of an arbitration clause under the Convention. *Prudential-Bache Securities. Inc. v. Fitch*, 966 F.2d 981, 988 (5th Cir. 1992). At the most, the Convention's removal provision should require the Court to determine whether there is a substantial likelihood that an arbitration clause exists between the parties and that it controls as to the claims at issue. Where there does not appear to be such a likelihood from the face of the complaint or by a strong showing to that effect by the removing party, the case should be remanded. *Cf. Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40, 42 (5th Cir. 1992) (doubts in controlling law resolved in favor of remand); *Production Stamping*, 829 F.Supp. at 1075 ("when there is doubt as to the right of removal in the first instance, ambiguities are to be construed against removal.")

## IV. THERE IS NO DIVERSITY

As a fall-back, Ruhrgas claims that federal diversity jurisdiction exists in this case as well. However, the presence of aliens (Ruhrgas of Germany and Marathon Norge

of Norway) on both sides of the docket necessarily precludes diversity. *Giannakos v. M/V Bravo Trader*, 762 F.2d 1295, 1298 (5th Cir. 1985) (*per curiam*). To hurdle this determinative obstacle, Ruhrgas argues that Marathon Norge was fraudulently joined as a plaintiff.

Federal courts long have been suspicious of fraudulent joinder assertions, and such arguments are not favored. *Burden v. General Dynamics Corp.*, 60 F.3d 213, 217 (5th Cir. 1995). As the Fifth Circuit has repeatedly stressed, "The burden of persuasion placed upon those who cry 'fraudulent joinder' is indeed a heavy one." *Ford v. Elsbury*, 32 F.3d 931, 935 (5th Cir. 1994). In resolving such claims the court need not look beyond the averments in the Petition and, in all events, should not look beyond the documentary record. *Burden*, 60 F.3d at 217; *Carriere v. Sears, Roebuck & Co.*, 893 F.2d 98, 100 (5th Cir.), *cert. denied*, 498 U.S. 817 (1990). "[A]ll disputed questions of fact and all ambiguities in the controlling law [are resolved] in favor of the non-removing party." *Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40, 42 (5th Cir. 1992). If the removing party cannot show that plaintiff has "no possibility of recovery," there is no fraudulent joinder, and the case must be remanded. *Id.*

The operative question is whether Norge has "any possible interest in the cause of action." *Wright & Miller* § 3641. In order to qualify as a party in interest, a plaintiff simply must be entitled under the governing law to enforce a right. *Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc.*, 630 F.2d 250, 256-57 (5th Cir. 1980).

Norge owns the Production License covering the Heimdal field. Contrary to Ruhrgas's argument, Norge



has not abandoned its interest in the Heimdal field. Instead, the company has what amounts to a remainder interest in the field – it holds title to the Production License, it owns a percentage of the gas still in the ground in the Heimdal field, and *all* rights and obligations under the Production License will revert to it if MPCN defaults under the Pass Through Agreements. *See* Affidavit of Finn E. Engzelius. As Ruhrgas correctly points out, day-to-day operations currently are conducted by MPCN, but MPCN already has informed Norge that those operations essentially will cease when its contract with Ruhrgas terminates next year. There is also a value to the gas still in the ground that has not been sold. When MPCN ceases sales under its contract with Ruhrgas next year, Norge's interest in the field will not simply disappear; instead, Norge will be forced to find a buyer for its remaining gas. As is stressed in the Petition and noted above, the value of Norge's license has been greatly diminished as a result of Ruhrgas' wrongful interference and actions.

Norge's interest in the Heimdal field can be analogized to a remainder interest in mineral rights, although Norge's existing rights actually are greater than the typical remainder interest. There can be no doubting that the holder of remainder interest in valuable minerals has enforceable rights under Texas law. *E.g., Hamilton v. Hamilton*, 42 S.W.2d 814, 817 (Tex. Civ. App. – Amarillo 1931, writ ref'd); *see also*, 1 Eugene Kuntz, *Oil And Gas* § 8.3 (1987); 31 C.J.S. *Estates* § 98, at 185 (1964) ("The remainderman may sue for torts affecting his estate, although it also affects the estate of the tenant in possession."); *see also Yturri v. Yturri*, 504 S.W.2d 809 (Tex. Civ. App. – San

Antonio 1973, no writ) (trust). Thus, it is clear that Norge has much more than some "possibility of recovery" here. Indeed, Norge's presence here, albeit disquieting to Ruhrgas, is not only proper, it may well be essential. *See* Fed. R. Civ. P. 19 (regarding joinder of necessary parties).

## V. THE COURT SHOULD ORDER REIMBURSEMENT OF COSTS, INCLUDING REASONABLE ATTORNEY'S FEES.

28 U.S.C. § 1447(c) provides that the Court may, in its discretion, "require payment of just costs and actual expenses, including attorneys fees" where a case has been removed improvidently. Here, there is not even an arguable basis for removal, as Ruhrgas should have known long before it filed its removal papers. Accordingly, Plaintiffs respectfully request an award of their costs and expenses, and will submit a summary of the fees and expenses they have incurred as a result of Ruhrgas' improper removal.

## VI. CONCLUSION

This Court has no subject matter jurisdiction over this proceeding, and should remand the case to the state court in which it was filed. Plaintiffs have not stated any federal claims in their Petition, are not parties to any arbitration agreement with Ruhrgas, have not otherwise consented to any of the claims in this case being submitted to arbitration, and have not been fraudulently joined in any way. Ruhrgas' attempts to impose upon Plaintiffs the provisions of a separate contract between it and MPCN, a non-party, is not legally supportable, would



deprive Plaintiffs of their constitutional rights, and should be rejected immediately. This case never should have been removed, and Plaintiffs have been forced to spend a substantial amount of money to protect their rights. Accordingly, they request that the Court remand this case without delay and award them their costs in this matter.

Respectfully submitted,

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(w/permission by JT)
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**CERTIFICATE OF SERVICE**

A copy of this document was served on Ruhrgas' attorneys of record in accordance with Federal Rule of Civil Procedure 5, on September 14, 1995.

/s/



**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

| | | |
|---|---|---|
| **MARATHON OIL COMPANY, MARATHON INTERNATIONAL OIL COMPANY and MARATHON PETROLEUM NORGE A/S** | § | **CIVIL ACTION NO. H-95-4176** |
| **Plaintiffs,** | § | |
| **v.** | § | |
| **RUHRGAS, A.G.** | § | |
| **Defendant.** | § | |

**PLAINTIFFS' MOTION FOR STAY PENDING RESOLUTION OF THEIR MOTION TO REMAND**

In light of, and subject to, their motion to remand, Marathon Oil Company, Marathon International Oil Company, and Marathon Petroleum Norge A/S, collectively "Plaintiffs," respectfully urge this Court to stay all further proceedings in this case pending resolution of their motion to remand.

1. Plaintiffs filed this action against Defendant Ruhrgas in Texas state court on July 6, 1995. Ruhrgas removed the case to this Court on August 21, 1995.

2. On September 15, 1995, Plaintiffs filed their motion to remand this action to the 152nd Judicial District Court of Harris County, Texas because this Court lacks subject matter jurisdiction over the dispute.

3. Defendant has filed a plethora of motions in this Court: motions to dismiss, a motion to stay, a motion to seal certain documents, etc. Before addressing the merits of any of these motions, the Court first should determine whether it has jurisdiction over this dispute. *See Kerbow v. Kerbow*, 421 F. Supp. 1253, 1258 (N.D. Tex. 1976); *Nichols v. Southeast Health Plan of Alabama*, 859 F. Supp. 553, 559 (S.D. Ala. 1993). If, as Plaintiffs contend, this Court lacks subject matter jurisdiction over the case, there will be no need for the Court to consider any of Defendant's other motions.

4. If this case ultimately is remanded, most of the issues raised by Defendant's outstanding motions will be treated differently in state court. For example, a Texas state court special appearance would focus on Defendant's contacts with Texas. *See* Tex. R. Civ. P. 120a. On the other hand, given Defendant's contention that federal question jurisdiction exists, its contacts with the entire United States may be relevant to its federal motion to dismiss. See Fed. R. Civ. P. 4(k)(2) and advisory committee notes pertaining thereto. Federal forum non conveniens practice is vastly different from Texas practice, which hardly recognizes the doctrine. Motions to seal under state law are governed by the requirements of Tex. R. Civ. P. 76a, not federal common law.

5. Accordingly, if the case ultimately is remanded, much of the time and money spent discovering and responding to the issues raised by Plaintiffs' motions will have been for nothing. To prevent this potential (and substantial) waste of resources, Plaintiffs request that the Court stay all further proceedings in this case pending its resolution of the Motion to Remand. This stay would,



among other things, excuse Plaintiffs from responding to Defendant's motions until after the Court has determined there is subject matter jurisdiction, and protect all parties from the expense associated with unnecessary discovery and motion practice. Such stays certainly are not unusual in this District. *Cf. Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1369 (S.D. Tex. 1995).

**Wherefore**, Plaintiffs move the Court to stay all further proceedings in this action until the pending Motion to Remand is resolved.

Respectfully submitted,

/s/ Clifton T. Hutchinson*
*w/authority LA Freeman

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**CERTIFICATE OF CONFERENCE**

Counsel for movant has conferred with counsel for respondent, and they cannot agree about the disposition of this motion.

/s/ Greg Taylor*
*w/authority LA Freeman

**CERTIFICATE OF SERVICE**

A copy of this document was served on Defendant's attorneys of record in accordance with Federal Rule of Civil Procedure 5, on September 15th, 1995.

/s/ Greg Taylor
*w/authority LA Freeman

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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

| | | |
|---|---|---|
| MARATHON OIL COMPANY, MARATHON INTERNATIONAL OIL COMPANY, and MARATHON PETROLEUM NORGE A/S, | ) | CIVIL ACTION NO. H-95-4176 |
| Plaintiffs, | ) | |
| VS. | ) | |
| RUHRGAS, A.G., | ) | |
| Defendant. | ) | |

**RUHRGAS AG'S MOTION FOR ORDER STAYING MERITS DISCOVERY, DEFERRING RULE 26(f) MEETING AND RULE 26(a) INITIAL DISCLOSURES, AND AUTHORIZING LIMITED DISCOVERY ON SUBJECT MATTER JURISDICTION AND PERSONAL JURISDICTION ISSUES**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Ruhrgas AG, Defendant herein, subject to and without waiver of its previously filed motions, including without limitation its Motion to Dismiss for lack of personal jurisdiction and for insufficient service of process, files this Motion for Order Staying Merits Discovery, Deferring Rule 26(f) Meeting and Rule 26(a) Initial Disclosures, and Authorizing Limited Discovery on Subject Matter Jurisdiction and Personal Jurisdiction Issues, and would show the Court the following:

1. This case was originally filed by Plaintiffs in the 152nd District Court of Harris County, Texas. On August 21, 1995, Ruhrgas AG removed the case to this Court.

2. On August 28, 1995, Ruhrgas AG filed the following motions:

a) Motion to Dismiss Under Fed. R. Civ. P. 12(b)(2), (4), and (5);

b) Motion for Stay Pending Arbitration; and

c) Motion to Dismiss on *Forum Non Conveniens* Grounds;

3. Plaintiffs have now filed a Motion to Remand, asking this Court to remand this case to state court.

4. The parties have stipulated that the time for Plaintiffs to respond to that portion of the Motion to Dismiss based on lack of personal jurisdiction and to the Motion to Dismiss on *Forum Non Conveniens* Grounds should be extended to December 1, 1995, and that the time for Defendant to respond to Plaintiffs' Motion to Remand should be extended to December 1, 1995. This stipulation has been approved by the Court.

5. Pursuant to the Order of Conference entered in this case, an initial pre-trial and scheduling conference is scheduled before U.S. Magistrate Judge Frances H. Stacy on November 1, 1995. The Order of Conference further provides that a joint report of the meeting required by Fed. R. Civ. P. Rule 26(f) and a joint discovery/case management plan be filed not less than 10 days before the November 1, 1995 conference. Pursuant to Fed. R. Civ. P. Rule 26(d), merits discovery would commence after the Rule 26(f) meeting, and the parties would be required to



make their initial disclosures within 10 days thereafter pursuant to Fed. R. Civ. P. Rule 26(a)(1).

6. Ruhrgas AG respectfully submits that merits discovery (and the Rule 26(f) meeting and initial disclosures, which relate to merits discovery), should be stayed and deferred until after the Court has ruled on the dispositive motions filed by the parties. The Fifth Circuit has held that a trial court may properly exercise its discretion to stay merits discovery pending a decision on dispositive motions. ***Corwin v. Marney, Orton Investments***, 843 F.2d 194, 200 (5th Cir. 1988). As shown below, such an order is particularly appropriate for the dispositive motions pending before the Court in this case.

7. In its Motion to Dismiss Under Fed. R. Civ. P. 12(b)(2), (4), and (5), Ruhrgas AG has challenged personal jurisdiction and, given Plaintiffs' admitted failure to serve Ruhrgas AG, a German corporation, under the Hague Service Convention, the sufficiency of service of process. With respect to personal jurisdiction, in ***Riverplate Corp. v. Forestal Land, Timber & Railway Co., Ltd.***, 185 F. Supp. 832, 836 (S.D.N.Y. 1960), the Court stayed merits discovery on the merits pending a determination of the personal jurisdiction challenge made by the defendants, stating:

> If the moving defendants are right in their claim that they are not to be 'found' within the jurisdiction, it would be grossly unfair to subject them to examination as parties and to force them to disclose private and confidential material with respect to their business practices. . . . [I]f this Court has no jurisdiction over the moving defendants they should not be placed in the

> position of being forced to disclose details of transactions which may be entirely lawful under foreign law.

185 F. Supp at 836. ***See also Wright v. Xerox Corp.***, 882 F. Supp. 399, 409, 411 (D.N.J. 1995) (trial court reserved decision on the personal jurisdiction issue as to one defendant and limited discovery as to that defendant strictly to the issue of personal jurisdiction). Similarly, a stay of merits discovery is justified pending a decision on a challenge to the sufficiency of service of process. ***See Thompson v. F.W. Woolworth Co.***, 508 F. Supp. 520, 521 (N.D. Miss. 1980). A stay is particularly appropriate here given the international comity interests involved in the application of the Hague Service Convention, which the U.S. Supreme Court has held to be mandatory where transmittal of service abroad is required. ***See Volkswagenwerk Aktiengesellschaft v. Schlunk***, 486 U.S. 694 (1988). These international comity interests would be violated if Ruhrgas AG were required to respond to merits discovery before being properly served under the Hague Service Convention.

8. Ruhrgas AG has also filed a Motion for Stay Pending Arbitration. Discovery on the merits prior to arbitration is inconsistent with the aims of arbitration. ***Suarez-Valdez v. Shearson Lehman/American Express, Inc.***, 858 F.2d 648 (11th Cir. 1988). Where a defendant has urged that a dispute should be stayed pending arbitration, the court should stay merits discovery pending the determination of the arbitrability issue because "discovery would be affirmatively inimical to [plaintiffs] obligation to arbitrate, if this court determines it to have such obligation." ***Lummus Co. v. Commonwealth Oil Refining***



***Co., Inc.***, 273 F.2d 613, 613 (1st Cir. 1959); ***see also ARW Exploration Corp. v. Aguirre***, Fed. Sec. L. Rep. (CCH) ¶ 95, 776 (W.D. Okla. 1990) (court denied discovery on issues other than arbitrability pending ruling on motion to compel arbitration).

9. The pendency of Ruhrgas AG's Motion to Dismiss on *Forum Non Conveniens* Grounds also justifies a stay of merits discovery. In ***Transunion Corp. v. Pepsico, Inc.***, 811 F.2d 127, 130 (2nd Cir. 1987), the Second Circuit affirmed the trial court's decision to stay discovery pending determination of a motion to dismiss on *forum non conveniens* grounds. The Second Circuit relied in part on the U.S. Supreme Court's decision in ***Piper Aircraft Co. v. Reyno***, 454 U.S. 233, 258 (1981), wherein the Court noted that [r]equiring extensive investigation would defeat the purpose of [the] motion." ***Transunion Corp.***, 811 F.2d at 130, ***quoting Piper Aircraft***, 454 U.S. at 258.

10. As shown by the authorities discussed above, a stay of merits discovery is warranted pending a ruling on the dispositive motions filed herein. Ruhrgas AG respectfully requests an order staying merits discovery and deferring the Rule 26(f) meeting and the initial disclosures required by Rule 26(a) until the Court has ruled on the dispositive motions.

11. Although merits discovery on the merits is inappropriate at this stage of the proceedings, limited discovery directed solely to issues raised by the dispositive motions is appropriate.[1] Although the parties have

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[1] The Court is not required to resolve the Motion to Remand prior to considering the other dispositive motions. ***See,***

attempted to agree on the scope of limited discovery to address these issues pursuant to Rule 26(d), FEDERAL RULES OF CIVIL PROCEDURE, the parties have been unable to reach any such agreement as a result of Plaintiffs' refusal to agree to any discovery on any subject matter jurisdiction issues. Contrary to Plaintiffs' position, the Fifth Circuit has recognized that factual issues may arise in determining subject matter jurisdiction on which discovery is appropriate. For example, in ***Carriere v. Sears, Roebuck & Co.***, 893 F.2d 98, 100 (5th Cir. 1990), the Fifth Circuit noted that in resolving an issue of fraudulent joinder in determining removal jurisdiction, the court is authorized to consider evidence outside of the pleadings, including deposition transcripts. Similarly, in ***Marcel v. Pool Co.***, 5 F.3d 81 (5th Cir. 1993), the Fifth Circuit upheld the denial of the Plaintiffs' motion to remand, which was based on an alleged insufficiency of the amount in controversy, stating that the Defendant *"timely conducted discovery*, and in response to [Plaintiffs] motion to remand, provided a detailed explanation of why it was apparent that the claim almost certainly was for well in excess of the jurisdictional threshold." 5 F.3d at 85 (emphasis added). In the same vein, the courts have routinely permitted discovery on issues relating to a corporation's

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*e.g.*, ***Villar v. Crowley Maritime Corp.***, 990 F.2d 1489, 1494 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 690 (1994) ("in ***Walker***, we clearly held that district courts have the power to rule on motions challenging personal jurisdiction before reaching motions to remand."); ***Walker v. Savell***, 335 F.2d 536, 539 (5th Cir. 1964).



principal place of business in determining whether diversity jurisdiction exists. ***See, e.g., Center for Radio Information, Inc. v. Herbst***, 876 F. Supp. 523-24 (S.D.N.Y. 1995).

12. These authorities demonstrate that discovery on subject matter jurisdiction issues is appropriate where the subject matter jurisdiction determination requires a factual inquiry. Such factual issues are presented here. For example, factual issues are raised on the questions whether Marathon Petroleum Norge A/S, the allegedly non-diverse Plaintiff, is a real party-in-interest and/or was fraudulently joined for the purpose of defeating diversity. As noted above, the Fifth Circuit has expressly held that with respect to such an issue, the court may go outside the pleadings and consider discovery products. *Carriere*, 893 F.2d at 100. Furthermore, under 9 U.S.C. § 206, this Court has removal jurisdiction if any of the claims at issue are subject to arbitration under the Convention on the Recognition and Enforcement of Foreign Arbitral Award, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 ("the Convention"), which need not appear from the face of the complaint, but which may be shown in the Notice of Removal. 9 U.S.C. § 206. As shown in the Notice of Removal, Ruhrgas AG contends that the claims asserted by Plaintiffs are derivative of those of their corporate affiliate, Marathon Petroleum Company (Norway) ("MPCN"), which has an arbitration agreement with Ruhrgas AG, and that Plaintiffs are therefore bound to arbitrate their claims herein. Ruhrgas AG should be permitted to conduct discovery on the derivative nature of Plaintiffs' claims and the relationships between Plaintiffs and MPCN to establish that Plaintiffs are bound by the

arbitration agreement and that this Court has subject matter jurisdiction under the Convention.

13. Pursuant to Rule 26(d), FEDERAL RULES OF CIVIL PROCEDURE, Ruhrgas AG respectfully requests authorization from the Court to conduct discovery limited to issues relevant to personal jurisdiction and subject matter jurisdiction. Specifically, Ruhrgas AG seeks authorization to take the deposition of Finn E. Engzelius, who has provided a Declaration in support of Plaintiff's Motion to Remand, pursuant to the notice attached hereto as Exhibit '1', as well as the deposition and document discovery described in the deposition notices attached hereto as Exhibits "2", "3", "4", and "5".

WHEREFORE, subject to Ruhrgas AG's previously filed motions, and without waiving same, Ruhrgas AG respectfully requests that the Court enter an Order (1) staying merits discovery and deferring the Rule 26(f) meeting and Rule 26(a)(1) initial disclosures, and (2) authorizing Ruhrgas AG to conduct the limited deposition and document discovery on personal jurisdiction and subject matter jurisdiction issues described in the deposition notices attached hereto as Exhibits "1", "2", "3" "4"



and "5", and that Ruhrgas AG have such other and further relief to which it may be justly entitled.

Respectfully submitted,

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## CERTIFICATE OF CONFERENCE

I have conferred with opposing counsel and have been informed that Plaintiffs oppose this Motion.

/s/ Guy S. Lipe
GUY S. LIPE

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on counsel of record for Plaintiffs by certified mail, return receipt requested this 4th day of October, 1995.

/s/ Guy S. Lipe
GUY S. LIPE



**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

| | | |
|---|---|---|
| MARATHON OIL COMPANY, MARATHON INTERNATIONAL OIL COMPANY, and MARATHON PETROLEUM NORGE A/S, | ) | CIVIL ACTION NO. H-95-4176 |
| Plaintiffs, | ) | |
| VS. | ) | |
| RUHRGAS, A.G., | ) | |
| Defendant. | ) | |

**RUHRGAS AG'S RESPONSE TO PLAINTIFFS' MOTION FOR STAY PENDING RESOLUTION OF THEIR MOTION TO REMAND**

(Filed Oct. 5, 1995)

TO THE HONORABLE JUDGE OF THE UNITED STATES DISTRICT COURT:

Defendant Ruhrgas AG, subject to and without waiver of its previously filed motions, including but not limited to its Motion to Dismiss for lack of personal jurisdiction and for insufficiency of process or service of process, files its Response to Plaintiffs' Motion for Stay Pending Resolution of their Motion to Remand.

## I.

## THE COURT MAY DECIDE THE MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(2), (4) & (5) BEFORE REACHING THE MOTION TO REMAND

Plaintiffs ask this Court to stay all further proceedings in this case, including any action on Ruhrgas AG's motions to dismiss, pending resolution of Plaintiffs' Motion to Remand. Initially, Plaintiffs contend that the Court must first determine whether it has subject matter jurisdiction before reaching all motions filed by Ruhrgas AG.[1] Plaintiffs are incorrect. This Court has discretion to reach Ruhrgas AG's Motion to Dismiss Under Fed. R. Civ. P. 12(b)(2), (4), and (5) before addressing Plaintiffs' Motion to Remand. The Fifth Circuit has unambiguously granted this Court that discretion:

> We think here the trial court had the power to dispose of the motion to quash before first passing on the motion for remand. . . . Since this case was, under the terms of the removal statute, unquestionably in the district court even though later subject to a proper motion for remand, if a suit could properly be pending anywhere, once it became apparent by the filing of the motion to quash service of process that there was a question raised by the defendant below whether it could properly be brought into court in Mississippi under any circumstances, it was proper for the trial court to examine into this question

[1] Ruhrgas AG has filed the following motions to date: (1) Motion to Dismiss Under Fed. R. Civ. P. 12(b)(2), (4), and (5), (2) Motion for Stay Pending Arbitration, (3) Motion to Dismiss on *Forum Non Conveniens* Grounds, and (4) Motion to Seal Gas Sales Agreement.



> immediately and not subject the defendant, so protesting, to a further hearing on the motion to remand and possibly to a further hearing in a state court where it would then have to raise once again the question of personal jurisdiction. Once appellee lodged in the district court its challenge to the jurisdiction in *personam*, it was entirely appropriate for that court to inquire into, and resolve, that issue.

***Walker v. Savell***, 335 F.2d 536, 538-539 (5th Cir. 1964). The Fifth Circuit recently reaffirmed its holding in ***Walker*** and noted that judicial economy favors such an approach:

> In ***Walker***, we clearly held that district courts have the power to rule on motions challenging personal jurisdiction before reaching motions to remand. ***As we noted, judicial economy favors this result because if the district court remands the proceeding, then the state court will probably have to decide the same motion to dismiss for lack of personal jurisdiction that the district court avoided.***

***Villar v. Crowley Maritime Corp.***, 990 F.2d 1489, 1494 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 690 (1994) (emphasis added); ***see also Jones v. Petty-Ray Geophysical Geosource, Inc.***, 954 F.2d 1061, 1066 (5th Cir.), *cert. denied*, 113 S. Ct. 193 (1992).

Plaintiffs rely on two district court cases for the proposition that the Court should first determine "whether it has jurisdiction over this dispute." ***See Kerbow v. Kerbow***, 421 F. Supp. 1253, 1258 (N.D. Tex. 1976); ***Nichols v. Southeast Health Plan of Ala.***, 859 F. Supp. 553, 559 (S.D. Ala. 1993). The clear holdings of the Fifth Circuit in

***Villar, Petty-Ray Geophysical,*** and ***Walker*** govern this Court, not the holdings of ***Kerbow*** and ***Nichols***.

## II.

## THE STAY REQUESTED BY PLAINTIFFS DOES NOT PROVIDE AN EFFICIENT MECHANISM FOR THE RESOLUTION OF THE PENDING MOTIONS

### A. The Remand Issues Are Intertwined With Issues Raised by Ruhrgas AG's Motions.

The stay requested by Plaintiffs would not promote judicial economy because the issues involved in determining subject matter jurisdiction overlap with the issues raised in Ruhrgas AG's Motion to Dismiss Under Fed. R. Civ. P. 12(b)(2), (4), & (5), its Motion for Stay Pending Arbitration, and its Motion to Dismiss on *Forum Non Conveniens* Grounds. For example, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, provides a basis for subject matter jurisdiction as well as a stay pending arbitration. Further, the question whether federal question jurisdiction exists under 28 U.S.C. § 1331 based on the substantial questions of foreign and international relations and questions of customary international law and act of state issues raised by Plaintiffs' claims, as well as the issues raised by the motions to dismiss for lack of personal jurisdiction and on *forum non conveniens* grounds, require examination of the numerous foreign contacts in this case. Additionally, discovery concerning the lack of personal jurisdiction over Ruhrgas AG will also be relevant to the Court's consideration of the Motion to Dismiss on *Forum Non Conveniens* Grounds. ***Cf.***



***Villar,*** 990 F.2d at 1495 (noting the overlap in discovery on personal jurisdiction and *forum non conveniens* issues). Because the issues raised by Ruhrgas AG's motions overlap with the issues raised in Plaintiffs' Motion to Remand, judicial economy would be served if all of the overlapping discovery relevant to all of the motions is simultaneously conducted, all of the motions are fully briefed, and the Court determines in its discretion the order in which the motions should be ruled on by the Court.

### B. State Court Analysis Would Be Identical.

Next, Plaintiffs incorrectly argue that certain issues will be "treated differently in state court." Plaintiffs' Mot. to Stay, at 2. Plaintiffs argue that the analysis on the issue of personal jurisdiction is different. However, the Texas long-arm statute has been interpreted to extend as far as federal due process protections will allow; therefore, the inquiry in either federal or state court is the same – whether the Court's exercise of personal jurisdiction comports with federal constitutional requirements. ***Bullion v. Gillespie,*** 895 F.2d 213, 215 & 215 n.2 (5th Cir. 1990) ("[T]he reach of the Texas long-arm statute . . . has been interpreted by Texas courts as extending to the limits of due process."); ***Guardian Royal Exchange Assurance, Ltd. v. English China Clays, P.L.C.,*** 815 S.W.2d 223, 226 (Tex. 1991) ("[W]e consider only whether it [the Texas long-arm statute] is consistent with federal constitutional requirements of due process for Texas courts to assert *in personam* jurisdiction."). Additionally, in the context of asserting personal jurisdiction over a foreign defendant, both the Supreme Court of the United States and the Texas Supreme Court have cautioned that "[g]reat care

and reserve should be exercised when extending our notions of personal jurisdiction into the international field." ***Asahi Metal Indus. v. Superior Court***, 480 U.S. 102, 115 (1987); ***Guardian Royal***, 815 S.W.2d at 229 (quoting ***Asahi***).[2]

Plaintiffs then argue that "[f]ederal *forum non conveniens* practice is vastly different from Texas practice, which hardly recognizes the doctrine." Plaintiffs' Mot. to Stay, at 2. While this was true in personal injury and wrongful death cases, this is not true with respect to the allegations made the basis of this lawsuit. ***See, e.g., Flaiz v. Moore***, 359 S.W.2d 872, 874 (Tex. 1962) (acknowledging existence of the doctrine in Texas); ***A.P. Keller Dev., Inc. v. One Jackson Place, Ltd.***, 890 SW.2d 502, 505 (Tex. App. – El Paso 1994, no writ) (affirming trial court's dismissal on

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[2] Plaintiffs suggest in their Motion that the potential applicability of Rule 4(k)(2), Federal Rules of Civil Procedure, to the personal jurisdiction analysis in the event a federal question is identified by the Court requires that the Court first consider the subject matter jurisdiction issues raised by the Motion to Remand. Rule 4(k)(2) applies only in the rare circumstance in which the plaintiff proves that (1) a federal question exists, (2) the defendant is not subject to the jurisdiction of the courts of general jurisdiction of any of the fifty states, and (3) the exercise of jurisdiction is nevertheless consistent with the Constitution and laws of the United States. Nothing in the First Amended Petition or any other pleading filed by Plaintiffs suggests that Plaintiffs intend to rely on Rule 4(k)(2) in support of personal jurisdiction. To the contrary, the papers filed by Plaintiffs to date demonstrate that Plaintiffs' personal jurisdictional argument is that the Texas courts do have jurisdiction over the person of Ruhrgas AG. As shown herein, the analysis utilized in determining the validity of such an argument is the same in the federal and state courts.



*forum non conveniens* grounds); ***Sarieddine v. Moussa***, 820 S.W.2d 837, 839-40 (Tex. App. – Dallas 1991, writ denied) (holding that Texas courts still recognize doctrine outside of personal injury and wrongful death cases). All of these Texas cases applied the factors enumerated in ***Gulf Oil Corp. v. Gilbert***, 330 U.S. 501 (1947), which are the same factors federal courts apply in determining whether to dismiss an action on *forum non conveniens* grounds. ***See, e.g., Bauingart v. Fairchild Aircraft Corp.***, 981 F.2d 81-4, 835-36 (5th Cir. 1993), *cert. denied*, 113 S. Ct. 2963 (1993).

Finally, Plaintiffs cite ***Delgado v. Shell Oil Co.***, 890 F. Supp. 1324, 1369 (S.D. Tex. 1995) for the proposition that the courts in this district have granted stays of the type requested by Plaintiff. In ***Delgado***, the court "simultaneously consider[ed] the merits of plaintiffs' motions to remand and to dismiss for lack of subject matter jurisdiction and ***defendants' motions to dismiss for f.n.c." Id.*** at 1369 (emphasis added). Further, the opinion in ***Delgado*** does not show that any motion to dismiss for lack of personal jurisdiction or insufficiency of process was pending.

For these reasons, Ruhrgas AG respectfully requests, subject to and without waiver of its previously filed Motions, including but not limited to its Motion to Dismiss for lack of personal jurisdiction and for insufficiency of process or service of process, that the Court deny

Plaintiffs' Motion for Stay Pending Resolution of their Motion to Remand.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing were served on all counsel of record by certified mail, return receipt requested this 5th day of October, 1995.

/s/ Guy S. Lipe
GUY S. LIPE

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

| | | |
|---|---|---|
| MARATHON OIL COMPANY, MARATHON INTERNATIONAL OIL COMPANY, and MARATHON PETROLEUM NORGE A/S | § | CIVIL ACTION NO. H-95-4176 |
| Plaintiffs, | § | |
| v. | § | |
| RUHRGAS, A.G. | § | |
| Defendant. | § | |

**PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO STAY AND TO LIMIT DISCOVERY**

Plaintiffs Marathon Oil Company, Marathon International Oil Company, and Marathon Petroleum Norge A/S file the following response to Defendant Ruhrgas A.G.'s Motion for Order Staying Merits Discovery, Deferring Rule 26(f) meeting and Rule 26(a) Initial Disclosures, and Authorizing Limited Discovery on Subject Matter and Personal Jurisdiction Issues.

**Summary of Argument**

Two months ago, Ruhrgas removed this case to federal court and immediately filed a number of motions seeking to have the action dismissed. Those motions, along with Plaintiffs' motion to remand, still are pending.



Now Ruhrgas has asked the Court to stop all other activity in the case while Ruhrgas conducts "limited" discovery on personal and subject matter jurisdiction issues. This request is unnecessary, unworkable, and improper.

Plaintiffs previously have filed a motion stay this case (including all discovery) pending the Court's decision on their Motion to Remand.[1] If the Court grants that motion or ultimately remands the case, Defendant's motion will be moot. But even if the Court ultimately declines to remand the case, there still is no reason to restrict discovery. If the case remains in federal court, Plaintiffs will require (and are entitled to) substantial discovery on the remaining personal jurisdiction issues. Because "specific" jurisdiction in any case hinges on the merits (here, on the occurrence of misrepresentations and omissions by Ruhrgas in Texas), the jurisdictional issues necessarily (and substantially) overlap with issues on the merits. Accordingly, discovery cannot be "limited" as Ruhrgas suggests.

Ruhrgas' request to conduct its own discovery on personal jurisdiction issues is patently unnecessary. The only personal jurisdiction issue in this case is Ruhrgas' assertion that it is not subject to personal jurisdiction in Texas.[2] Obviously, Ruhrgas already has complete knowledge of its own jurisdictional contacts, so it certainly does

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[1] *See* Plaintiffs' Motion for Stay Pending Resolution of Their Motion to Remand. Oddly enough, Defendant opposes such a stay.

[2] Despite its own contention that federal jurisdiction is based on the presence of a federal question, (Ruhrgas Notice of Removal at 1) Ruhrgas has ignored the application of the federal long-arm statute which does not inquire into Ruhrgas' contacts

not need to conduct discovery on personal jurisdiction issues.

Despite having already removed this case, Ruhrgas nevertheless wants to conduct "subject matter jurisdiction" discovery to determine whether there are any facts available to support that removal. This request is as extraordinary as it is improper. In opposing Plaintiffs' motion to remand, Ruhrgas will have the burden of proving that the case was removable *as of the time* the Notice of Removal was filed. Under federal law, a case may not be removed until it has "become removable," an inquiry ordinarily resolved by reference to the plaintiff's pleading, the Notice of Removal, and in some cases affidavits. When Ruhrgas removed this case, it either possessed facts to support removal jurisdiction or it did not. If it possessed such facts, it certainly does not need a stay to conduct additional discovery to find them now. If it did not possess such facts, then it improperly removed this case in violation of Federal Rule 11 and 28 U.S.C. § 1446.

Moreover, in light of the affidavits filed in support of Plaintiffs' motion to remand, the best Ruhrgas could hope to do in its proposed "limited" discovery would be to raise some contested issue of fact. All such issues, of course, must be resolved in Plaintiffs' favor for remand purposes; so further discovery could not possibly advance any outstanding issue. Plaintiffs respectfully urge that the proper course would be to deny Ruhrgas' request and to either rule on the remand question or to

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with *Texas*. Instead, it requires examination of Ruhrgas' contacts with the United States. *See* Fed. R. Civ. P. 4(k) and related Advisory Committee Notes.



permit discovery to go forward without the restrictions Ruhrgas proposes.

## I. Plaintiffs Already Have Requested A More Limited Stay.

The Plaintiffs previously have requested that the Court stay this case until Plaintiffs' Motion to Remand is resolved.[3] In addition to its current request for a stay to conduct discovery on its removal, Ruhrgas has moved to stay the entire case pending arbitration, to quash service and to dismiss on a variety of grounds. Presumably, the Court will resolve Plaintiffs' remand motion before (or, at the latest, concurrently with) many of Defendants' outstanding motions. If the Court grants Plaintiffs' motion to stay, Defendant's motion will become moot for the time being because the Court already will have stayed the case. In any event, however, the Court should deny Ruhrgas' request to stay all other discovery while it investigates its own removal. Ruhrgas' request to stay the case while it supposedly "discovers" the basis for its removal and its own jurisdictional contacts seems less directed at relevant issues than delay. As set forth more fully below, such requests are premature, improper, and/or irrelevant.

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[3] *See* Plaintiffs' Motion to Stay Pending Resolution of their Motion to Remand (9/15/95).

A. *Unlike the Remand Question, the Personal Jurisdiction Question Involves Substantial Factual Inquiry that Need Not Be Resolved at the Outset.*

If this case is not remanded, Plaintiffs will need to conduct discovery related to personal jurisdiction. It is not clear from Ruhrgas' motion whether Ruhrgas would even permit the Plaintiffs to conduct discovery related to personal jurisdiction, although the Plaintiffs clearly are entitled to conduct such discovery. *E.g., Skidmore v. Syntex Labs., Inc.*, 529 F.2d 1244, 1248 (5th Cir. 1976).[4] To the extent removal jurisdiction in this case involves a federal question, which Ruhrgas asserts, Plaintiffs also will need to conduct discovery on Ruhrgas' contacts with the United States, as well as Texas. *See* Fed. R. Civ. P. 4(k)(2) and the Advisory Committee Notes relating to that rule; *Eskofot Als v. Dupont*, 812 F.Supp. 81, 87 (S.D. N.Y. 1995). If the case ultimately is remanded, discovery relating to issues such as Ruhrgas' U.S. contacts will have been nothing but wasted effort.

B. *There is no Reason to Conduct Discovery in Phases, Particularly Where Jurisdictional Issues Overlap with the Merits.*

Many of the personal jurisdiction discovery issues substantially overlap with the merits of this case.[5] For

[4] The only reason Plaintiffs have not yet begun taking this discovery is that their Motion to Stay Pending Resolution of their Motion to Remand still is pending.

[5] Discovery on general personal jurisdiction would not overlap with the merits. Discovery on specific personal



example, Ruhrgas has traveled to Texas to meet with Marathon representatives on several occasions. It also has made numerous phone calls to Marathon in Texas, and has sent numerous faxes, telexes, letters and other documents to Marathon in Texas. Many of these contacts directly concern Marathon's investment in the Heimdal field, which is the subject matter of this litigation. As a result, it makes little sense to take discovery that would prove up the fact of these contacts, but stop short of discussing their content. *See Wyatt v. Kaplan*, 686 F.2d 276, 280 (5th Cir. 1982) ("When, as in this case, personal jurisdiction is predicated on the commission of a tort within the state, of course the jurisdictional question involves some of the same issues as the merits of the case."). Indeed, the *content* of these conversations and documents will be *critical* to establishing "specific" personal jurisdiction. As a result, personal jurisdiction discovery and merits discovery must proceed together. Even if the two issues somehow could be divorced, given that the relevant witnesses reside throughout continental Europe, there is no legitimate reason to force Plaintiffs to incur the substantial expense of deposing these witnesses twice.[6]

Plaintiffs believe the most logical and economical course would be for the Court first to determine whether

jurisdiction depend upon, and are factually intertwined with, the merits. Plaintiffs allege both general and specific personal jurisdiction.

[6] Pursuant to Rule 26(d), Plaintiffs already are entitled to begin taking seeking merits discovery in this case. Thus far, they have declined to do so in light of their pending motions.

there is any basis for removal jurisdiction in this case. Then, and only then, should discovery relating to personal jurisdiction and the merits commence.

## II. Ruhrgas Does Not Need Discovery On Its Own Jurisdiction Contacts.

Aside from the fact that jurisdictional discovery will substantially overlap with the merits, the Court also should deny Ruhrgas' requested discovery because it is unnecessary and irrelevant. For instance, there is no reason to permit the *Defendant* to conduct discovery on personal jurisdiction issues in this case. The only issue relating to personal jurisdiction is Ruhrgas' contention that it is not [sic] does not possess sufficient contacts with Texas to subject it to personal jurisdiction here. Obviously, Ruhrgas already has knowledge of its own contacts with this state and considered that information before it filed its motion to dismiss for lack of personal jurisdiction.[7] To the extent that Plaintiffs allege facts that also would support the exercise of personal jurisdiction over Ruhrgas, those facts must be presumed to be true. *E.g., Wyatt v. Kaplan*, 686 F.2d 276, 280 (5th Cir. 1982). Either way, halting progress on the case ostensibly to permit Ruhrgas to conduct discovery on its *own* contacts with Texas would be a tremendous waste of time and money. Certainly there is no logical reason why the Court should

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[7] Indeed, the affidavits attached to Ruhrgas' Motion to Dismiss Under Fed. Rule 12(b)(2) may themselves evidence contacts sufficient to establish general personal jurisdiction in Texas.



stop all other discovery in the meantime while Ruhrgas conducts this quest.

## III. Ruhrgas Is Not Entitled to Remove First, Then Ask Questions Later.

Ruhrgas' request to stay the case while it ostensibly "discovers" the basis for its removal is even more improper. Ruhrgas unilaterally removed this case to federal court, thereby wresting the action from Plaintiffs' chosen forum. In so doing, Ruhrgas was required by Federal Rule 11 and 28 U.S.C. § 1446 to have sufficient (and specific) legal and factual basis for doing so. If Ruhrgas did not have such a basis, that fact certainly is no reason to stay and allow discovery on the issue now.

Ruhrgas has been unable to cite a single decision at any level – let alone within the Fifth Circuit – supporting the notion that a defendant may remove a case and then halt that action's progress while the defendant goes in search of facts supporting removal. As is shown below, federal courts, including this Court, have held that a case which has been removed before the record confirms its removability should be remanded immediately with costs.

### A. *Ruhrgas' Request Fundamentally Misperceives the Removal Process.*

Removal is a purely technical process for the transfer of cases between the state and federal courts. *Spencer v. New Orleans Levee Bd.*, 737 F.2d 435, 438 n.1 (5th Cir. 1984). A case can be removed if the plaintiffs' pleading confirms

the presence of either a federal question or complete diversity. Otherwise a case should proceed in the state forum, unless and until it appears that the case has "become removable." 28 U.S.C. § 1446(b); *see, e.g., Vasquez v. Alta Bonito Gravel Plant Corp.*, 56 F.3d 689, 690-91 n.1 (5th Cir. 1995) (presuming responses to interrogatories to be proper trigger for removal); *Roberson v. Orkin Exterminating Co., Inc.*, 770 F. Supp. 1324, 1328 (N.D. Ind. 1991) (holding that interrogatory responses may create basis for removal).

Given that a defendant must wait until a case has "become removable" before it can file a Notice of Removal pursuant to 28 U.S.C. § 1446(b), it comes as no surprise that Ruhrgas was unable to cite any authority endorsing its removal-first, ask-questions-later approach. In fact, just the opposite is true. *E.g., University of Tennessee v. USF&G*, 670 F. Supp. 1379, 1382 (E.D. Tenn. 1987) (resolving remand issue without "necessity of protracted and arguably endless discovery that could overshadow the real issues"). When a defendant has removed a case without already having the necessary support for removal, courts have *not* halted the case to permit the defendant to go in search of support for federal jurisdiction, simultaneously preventing any other discovery related to the merits from going forward. Instead, courts have imposed sanctions under Federal Rule 11, or simply remanded and awarded the plaintiff his costs under 28 U.S.C. § 1447(c). *E.g., News-Texan, Inc. v. City of Garland, Tex.*, 814 F.2d 216, 218-21 (5th Cir. 1987); *Davis v. Veslan Enters.*, 765 F.2d 494, 497-99 (5th Cir. 1985); *Mendez v. Plastofilm Indus., Inc.*, No. 91-C-8172, 1992 WL 80969 (N.D. Ill. Apr. 15, 1992) *Samuel v. Langham*, 780 F. Supp. 424, 428



(N.D. Tex. 1992).[8] In fact, federal district courts can (and often do) remand to state court *sua sponte* and without notice where, as here, the removal papers reveal that removal jurisdiction is lacking. *E.g., News-Texan, Inc.*, 814 F.2d at 219 (affirming remand); *Liberty Mut. Ins. Co. v. Ward Trucking Corp.*, 48 F.2d 742, 750 (3d Cir. 1995) (refusing even to review district court's remand order issued without opportunity to respond).

### B. *Removal Jurisdiction is Limited and Should Be Resolved Summarily Based on the Facts at the Time of Removal.*

Removal jurisdiction has been closely circumscribed and its availability is supposed to be resolved in a summary manner. *E.g., L.P. Comm. Corp.*, 870 F. Supp. at 746; *University of Tennessee*, 670 F. Supp. at 1382. The propriety of removal is not supposed to take precedence over the merits. It is simply improper to remove a case and then search for a basis for removal after a Motion to Remand has been filed. Notwithstanding the Defendant's desire to remove the action to federal court, Congress had made it quite clear that only certain cases may be removed, and even those cases cannot be removed until they have "become removable." Thus, the Fifth Circuit has repeatedly stressed that removal is a "matter of statutory construction," that removal statutes are "strictly construed

[8] *See also International Shipping Co., S.A. v. Hydra Offshore, Inc.*, 875 F. 2d 388, 390-92 (2d Cir. 1989) (affirming sanctions on plaintiff for urging federal jurisdiction where aliens were present on both sides of docket).

against removal,"[9] and that, even where it is permissible to look beyond the plaintiff's pleading (such as in cases of a fraudulently joined defendant), the "inquiry is capable of summary determination." *Leffall v. Dallas Indep. School Dist.*, 28 F.3d 523, 524 (5th Cir. 1994); *Lackey v. ARCO*, 990 F.2d 202, 208 (5th Cir. 1993); *Green v. Amerada Hess Corp.*, 707 F.2d 201, 204-05 (5th Cir. 1983); *B. Inc. v. Miller Brewing Co.*, 663 F.2d 545, 550-551 (5th Cir. 1981); *see also Vasquez*, 56 F.3d at 692 (stressing that removal is purely question of statutory construction); *Garrett v. Commonwealth Mortg. Corp. of Am.*, 938 F.2d 591, 593 (5th Cir. 1991) (same).

Jurisdictional facts are assessed on the basis of the plaintiff's complaint and the defendant's Notice of Removal at the time of removal. *Burns*, 31 F.3d 1097 at n.13; *Hernandez v. Central Power & Light*, 880 F. Supp. 494, 496 (S.D. Tex. 1994); *L.P. Comm. Corp.*, 870 F. Supp. at 746; *Adler v. Adler*, 862 F. Supp. 70, 73 (S.D.N.Y. 1994). While the court *may* look to facts beyond those stated in the plaintiff's pleading to assess a claim of fraudulent joinder, it certainly is not required to do so. *Burden v. General Dynamics Corp.*, 60 F.3d 213, 217 (5th Cir. 1995). And, even then, the inquiry deliberately is a summary one, mirroring (at least in part) the procedure used at the summary judgment stage. *E.g., Ford v. Elsbury*, 32 F.3d 931, 935 (5th Cir. 1994); *Kliebert v. Upjohn Co.*, 915 F.2d 142, 146 (5th Cir. 1990) (noting that evidence of jurisdictional amount supporting removal must come directly from pleadings "or, at the most, from summary judgment-type evidence"); *Green v. Amerada Hess Corp.*, 707 F.2d 201, 204-05 (5th Cir. 1983) (finding error in district court's conducting evidentiary hearing); *B., Inc.*, 663 F.2d at 549 n.9.[10] Thus, if the defendant has "facts" it hopes the court will consider, it should include them in the Notice of Removal.[11]

A party who has removed a case *before* conducting discovery in state court or otherwise confirming the factual basis on which the case has supposedly "become removable" cannot at that point insist that the basis for the removal be shown after it has had a chance to conduct discovery in federal court. This is true even when the relevant facts must be shown by reference to material outside the plaintiff's petition. For example, cases originating in Texas state courts do not state damage claims

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[9] The "[d]efendant's right to remove and the plaintiff's right to choose his forum are not on equal footing." *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994).

[10] Many cases support the notion that removal and remand procedure is analogous to the disposition on a motion for summary judgment. *E.g., Ford v. Elsbury*, 32 F.3d 931, 935 (5th Cir. 1994); *Kliebert v. Upjohn Co.*, 915 F.2d 142, 146 (5th Cir. 1990) (noting that evidence jurisdictional amount supporting removal must come directly from pleadings "or, at the most, from summary judgment-type evidence"); *Green v. Amerada Hess Corp.*, 707 F.2d 201, 204-05 (5th Cir. 1983) (finding error in district court's conducting evidentiary hearing); *B., Inc.*, 663 F.2d at 549 n.9.

[11] The analogy to summary judgment practice is a helpful one. Few would argue that *after* a defendant has filed a motion for summary judgment, he is entitled to stop all activity in the case to conduct further discovery in support of his motion. Likewise, a removing defendant can no more ask for a "time out" at this point than a summary judgment proponent. *Thomashevsky v. Komori Printing Mach. Co., Ltd.*, 715 F. Supp. 1562, 1564 (S.D. Fla. 1989); *see also Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1441-43 (5th Cir. 1993).

for specific amounts; thus, to remove such a case based on diversity, the amount in controversy must be proved by evidence outside the petition. Even in this context, however, the Fifth Circuit has held that such facts should be supplied by setting them forth "preferably in the removal petition, but sometimes by affidavit." *Eg., Allen v. R&H Oil & Gas Co.*, 63 F.3d 1326, 1335 (5th Cir. 1995).[12] Although providing an explicit list of "what types of proof are acceptable" to prove the amount in controversy, the Fifth Circuit significantly did *not* list the taking of post-removal discovery.

As Chief Judge Sear recently noted in remanding such an improvidently removed case:

> As is true of the other jurisdictional requirements for removal, the amount in controversy is determined on the basis of the record as it existed at the time the defendant sought to remove the action. The party invoking the federal court's jurisdiction must show to a legal certainty that each plaintiff's claim is not less than the jurisdictional amount. The removing party bears this burden *regardless of the status of discovery, the number of plaintiffs, or any problems created by the state procedural statutes.*

*Chouest v. American Airlines, Inc.*, 839 F. Supp. 412, 414 (E.D. La. 1993) (citations omitted, emphasis added); *see also Atkins v. Harcros Chem., Inc.*, 761 F. Supp. 444, 447

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[12] The Allen court noted that post-petition affidavits are allowable only if relevant to jurisdictional facts at the time of removal. 63 F.3d at 1335.



(E.D. La. 1991) (refusing discovery to establish jurisdictional amount) (citing *Kliebert*, 915 F.2d at 146)); *Broadstone Realty Corp. v. Evans*, 213 F. Supp. 261, 267 (S.D.N.Y. 1962) (refusing plaintiff's request to conduct discovery related to removal jurisdiction); *cf. Hasse v. Sessions*, 835 F.2d 902, 908 (D.C. Cir. 1987) (refusing plaintiff's request for discovery to oppose motion to dismiss for lack of subject matter jurisdiction). Were it otherwise, every case filed in state court could be removed to federal court until federal jurisdiction was affirmatively disproved after discovery. In reality the presumption is exactly to the opposite. *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995) ("there is a presumption against removal jurisdiction") (citing *Gaus v. Miles, Inc.*, 980 F.2d 564, 567 (9th cir. 1992)).

The removal statutes insist that the removing party place in its Notice of Removal a "short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a). Because Congress presupposed that there would already be some basis for the removal and that the remand question would be determined on the basis of the materials on hand, it did not authorize any new substantive basis for the removal to be added outside the thirty-day period following the point at which the case "became removable." In fact, in keeping with the notion that the papers on hand should suffice, the statute that would permit amendment of the Notice of Removal to include any new grounds for removal has been strictly construed to forbid any changes of substance; only technical amendments are permitted. *Wyant v. National R.R. Pass. Corp.*, 881 F. Supp. 919, 924-25 (S.D.N.Y. 1995); *Zaini v. Shell Oil Co.*, 853 F. Supp. 960, 964 & n.2 (S.D. Tex. 1994); *Castle v. Laurel Creek*

*Co., Inc.*, 848 F. Supp. 62, 64-65 (S.D. W. Va. 1994); *Ryan v. Dow Chem. Co.*, 781 F. Supp. 934, 939 (E.D.N.Y. 1992) (Weinstein, J.); *Moody v. Commercial Ins. Co. of Newark, N.J.*, 753 F. Supp. 198, 200 (N.D. Tex. 1990); *Courtney v. Benedetto*, 627 F. Supp. 523, 527 (M.D. La. 1986); *see also Aetna Casualty & Sur. Co. v. Hillman*, 796 F.2d 770, 775 (5th Cir. 1986).

Congress also did not intend for the removal process to become an obstacle to the merits. As the Supreme Court observed in *United States v. Rice*: "Congress . . . established the policy of not permitting interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the case was removed." 327 U.S. 742, 751 (1946). This is why Congress insisted that remand orders not be reviewed by appeal. *E.g., id.; Liberty Mut. Ins. Co. v. Ward Trucking Corp.*, 48 F.3d 742, 745 (3d Cir. 1995).

In sum, the remand issue should be resolved summarily on the strength (or weakness) of the claim of federal jurisdiction at the time of removal. It would be improper even to hold an evidentiary hearing. *Green v. Amerada Hess Corp.*, 707 F.2d 201, 204-05 (5th Cir. 1983). Ruhrgas' request that all progress in the case to cease so that it can take multiple depositions concerning removal plainly is not what Congress intended or what the Fifth Circuit had in mind when it warned that district court's should not pretry substantive factual issues in answering claims of fraudulent joinder. *E.g., id.* at 204.



*C. Discovery Cannot Assist the Court on Any Issue.*

Discovery in this case also could not further elucidate any of the bases for subject matter jurisdiction. The jurisdiction averments ultimately are questions of law. Even if the court were inclined to look beyond the pleadings in resolving the claims relating to arbitration and fraudulent joinder, and even if discovery in support of removal were available to retroactively support that removal, the discovery Ruhrgas currently is seeking could not assist the Court in ruling on the outstanding Motion to Remand. Thus, Ruhrgas' requested discovery should be denied. *Wyatt v. Kaplan*, 686 F.2d 276 (5th Cir. 1982) (Wisdom, J.); *Broadstone Realty*, 213 F. Supp. at 266-67.

Ruhrgas has asserted three bases for federal removal jurisdiction in this case:

federal question jurisdiction, the Convention on Recognition and Enforcement of Foreign Arbitral Awards, and diversity jurisdiction. Ruhrgas' requested discovery cannot help in establishing any of these bases.

*1. Plaintiffs' Pleading Control the Federal Question Issue.*

For example, the assertion that a federal question is present turns solely on the plaintiff's pleading. *E.g., Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). Ruhrgas' arguments in support of a federal question based on the supposed existence of international comity issues are, as the Fifth Circuit has already held, "foreclosed by the familiar well-pleaded complaint rule." *Aquafaith Shipping Ltd. v. Jarillas*, 963 F.2d 806, 808 (5th Cir.), *cert. denied*, 113

S. Ct. 413 (1992); *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1348 (S.D. Tex. 1995). None of the plaintiffs have stated any claims purporting to arise under the supposed federal common law of international relations. Thus, this issue could not be aided by any new factual discovery.

*2. The Convention Does Not Apply to this Case.*

Ruhrgas also claims that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act supports its removal. However, as the Supreme Court, the Fifth Circuit, and this court have repeatedly stressed, "arbitration is a matter of consent, not coercion." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1216 (1995). Thus, a party may be required to "submit to arbitration only if he has contracted to do so." *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 200 (1991). The Convention does not change this. *National Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326, 334 (5th Cir. 1987). To the contrary, by its own terms, the Convention does not apply (and thus does not provide an independent ground for removal) unless the parties have agreed in writing to submit the relevant claim to arbitration in a signatory nation. *E.g., Sphere Drake Ins. PLC v. Marine Towing*, 16 F.3d 666, 669 (5th Cir.), *cert. denied*, 115 S. Ct. 195 (1994). In its Notice of Removal and Motion to Stay Pending Arbitration, Ruhrgas concedes that no such agreement exists. The Declaration of Lutz K. Eckert, which is attached to Ruhrgas' Notice of Removal, is unequivocal on the subject:



**Ruhrgas has never entered into any agreement with any of the plaintiffs concerning gas produced from the Heimdal gas field or any matters which are the subject of the First Amended Petition filed by the plaintiffs in this action.**

Ruhrgas has completely failed to explain how discovery, even if it were allowed, could possibly create a fact issue on questions relating to the Convention when its own filings have conclusively foreclosed any possibility that the Convention applies to this action.

*3. Fraudulent Joinder Factual Disputes Must Be Resolved in Plaintiffs' Favor.*

Lastly, Ruhrgas claims that it needs discovery to establish diversity jurisdiction in this case. It is undeniable that the presence of Marathon Norge (an alien) forecloses the possibility of complete diversity with Ruhrgas (also an alien). *E.g., Zaini v. Shell Oil Co.*, 853 F. Supp. 961, 963 (S.D. Tex. 1994). Therefore, so long as Marathon Norge remains as a plaintiff, this case is not "removable" based on diversity. Ruhrgas' only asserted basis for diversity jurisdiction rests on the disfavored "fraudulent joinder" doctrine, which typically is used to challenge to the joinder of a nondiverse *defendant*. *Id.* at 964 (noting disfavored nature of claim and rule that "removal is construed restrictively so as to limit federal subject matter jurisdiction").

As Marathon Norge is the only nondiverse plaintiff, Ruhrgas should have attempted to dispose of Marathon Norge's claims in state court, and then, if successful in

that endeavor, removed the case once it "became removable." *E.g., WMW Machinery Co., Inc. v. Koerber AG*, 879 F. Supp. 16, 17 (S.D.N.Y. 1995). In any event, as is true generally, the existence of removal jurisdiction based on "fraudulent joinder" is determined by reference to the plaintiff's petition as of the time of removal. *Tenner v. Prudential Ins. Co. of Am.*, 872 F. Supp. 1571, 1572 (E.D. Tex. 1994). Only where the removing party pleads fraudulent joinder "with particularity" and comes forward with "clear and convincing evidence" that the plaintiff had no arguable basis at that time for believing that state law might impose liability may the party's citizenship be disregarded. *Parks v. New York Times Co.*, 308 F.2d 474, 478 (5th Cir. 1962); *Horton v. Scripto-Tokai Corp.*, 878 F. Supp. 902, 906 (S.D. Miss. 1995).

Marathon Norge's Managing Director already has attested to Marathon Norge's interest in this litigation. *See* Affidavit of Finn Engzelius (Ex. 1 to Plaintiffs' Motion to Remand). *See also* Plaintiffs' Brief in Support of Their Motion to Remand. Thus, even assuming that discovery *could* be available to support a previously filed notice of removal as an abstract matter, the discovery Ruhrgas seeks in this case could only produce, at best some conflict in the facts which would have to be resolved in favor of remand. *Burns*, 31 F.2d at 1095; *Lackey*, 990 F.2d at 207; *Horton v. Scripto-Tokai Corp.*, 878 F. Supp. 902, 906 (S.D. Miss. 1995) ("If there is any reasonable basis for predicting that the state law might impose liability, then the plaintiff must receive the benefit of the doubt and the cause must be remanded"); *L.P. Commercial Corp. v. Caudill*, 870 F. Supp. 743, 746-47 (S.D. Tex. 1994). To the extent Ruhrgas' proposed discovery seeks any new and substantially different basis for disregarding Marathon Norge,



which it does,[13] consideration of this new theory would require amendment of the Notice of Removal. As noted above, such a substantive amendment is not permitted.

**Conclusion**

Plaintiffs believe the Court will conclude that this case must be remanded. The conclusion can (and should) turn on the record at the time Defendant filed in its Notice of Removal. Other issues (such as personal jurisdiction) will require substantial discovery that invariably will overlap with the merits. Accordingly, the Court should either stay everything until it rules on the remand issue, or simply permit discovery to proceed without restriction as provided in the Federal Rules.

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[13] For instance, the interrogatories to Marathon Norge inquire into corporate separateness, which is not raised at all in the Notice of Removal.

**WHEREFORE**, Plaintiffs respectfully urge the Court to deny Defendant's motion to stay all discovery in this case, as well as its request to permit it to take new discovery on its own personal and subject matter jurisdiction.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

A copy of this document was served by mail on Defendant's attorneys of record in accordance with Federal Rule of Civil Procedure 5, on October 24, 1995.

/s/

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| MARATHON OIL COMPANY, MARATHON INTERNATIONAL OIL COMPANY, AND MARATHON PETROLEUM NORGE A/S, | ) | |
| Plaintiffs, | ) | CIVIL ACTION |
| vs. | ) | NO. H-95-4176 |
| RUHRGAS, A.G., | ) | |
| Defendant. | ) | |

**MEMORANDUM AND ORDER**

(Filed Nov. 16, 1995)

Pending before the Court are defendant Ruhrgas, A.G.'s ("Ruhrgas") Motion to Dismiss Under Fed. R. Civ. P. 12(b)(4) and (5) or to Quash Service of Process (Instrument #4), Motion to Seal Gas Sales Agreement (Instrument #10) and Motion for Order Staying Merits Discovery, Deferring Rule 26(f) Meeting and Rule 26(a) Initial Disclosures, and Authorizing Limited Discovery on Subject Matter Jurisdiction and Personal Jurisdiction Issues (Instrument #22) and plaintiffs Marathon Oil Company, Marathon International Oil Company, and Marathon Petroleum Norge A/S's (collectively "Marathon") Motion for Stay Pending Resolution of Their Motion to Remand (Instrument #14). Having reviewed the record in this case, the parties' submissions, and having considered the applicable law, the Court finds that Ruhrgas's motion to seal should be **GRANTED** and the other motions listed above should be **DENIED**.



The basis of the case is the development of the natural gas Heimdal Field ("the field") located in the Norwegian North Sea. The plaintiffs' affiliate MPCN entered into an agreement with Ruhrgas to sell its share of the gas from the field to Ruhrgas. The plaintiffs maintain that Ruhrgas and non-party Statoil conspired to have MPCN and the plaintiffs pay for the development of the field and then lock MPCN into the agreement which was not profitable. The plaintiffs claim that they have suffered losses due to the loans they made to MPCN as a result of Ruhrgas's conduct. The plaintiffs contend that Ruhrgas, by its actions with non-party Statoil, is liable to the plaintiffs for fraud, tortious interference with prospective business relationships, participation in breach of fiduciary duty, constructive fraud, and civil conspiracy.

Marathon filed this case in Texas state court on July 6, 1995. On August 21, 1995, Ruhrgas removed the case to federal court. The parties have filed several motions since the removal in late August. These includes, *inter alia* motions by Ruhrgas to stay pending arbitration, to dismiss for *forum non conveniens*, motion to dismiss for lack or [sic] personal jurisdiction and a motion to remand by Marathon. The Court has previously approved the parties' stipulation that responses to the motion to dismiss for lack of personal jurisdiction, motion to dismiss for *forum non conveniens*, and motion to remand shall not be due until December 1, 1995. *See* Instrument #19.

**Motions Concerning Service**

Marathon attempted to effect service, pursuant to Tex. Civ. Prac. & Rem. Code § 17.044, by serving the

petition on the Texas Secretary of State as Ruhrgas's agent for substitute service of process. Ruhrgas contends that Marathon was required by the Hague Convention (the Convention on service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 361, T.I.A.S. No. 6638 (Nov. 15, 1965)) to serve it through the proper German central authority along with a version of their Original or First Amendment Petition translated into German. Therefore, Ruhrgas filed the instant motion to dismiss for insufficiency of process under Fed. R. Civ. P. 12(b)(4) and to dismiss for insufficiency of service of process under Fed.R.Civ.P. 12(b)(5), or, alternatively, to quash service of process.

In the exchange of filings made concerning this motion, the parties mainly dispute whether the Hague Convention even applies in this instance. On October 27, 1995, however, Marathon filed an Unopposed Motion to Appoint Special Agent for Service Under the Terms of the Hague Convention (Instrument #20), which the Court granted on October 29, 1995. *See* Instrument #21. At the Scheduling Conference held November 6, 1995, Marathon represented to the Court that a German translation of the complaint is currently at the central authority in Germany awaiting execution of service. In view of the current situation, the Court considers the instant motion to dismiss or to quash service to be moot. Accordingly, the Court will deny the motion as moot subject to being reurged by Ruhrgas should service under the Hague Convention not be effected within a reasonable time.



**Motion to Seal Gas Sales Agreement**

In support of its motion to remand and motion to stay pending arbitration, Ruhrgas attached a copy of the Heimdal Gas Sales Agreement ("the Sales Agreement" between Marathon Petroleum Company (Norway) ("MPCN"), Ruhrgas, and other entities. Ruhrgas filed the Sales Agreement (Instrument #3) under seal pursuant to the proposed sealing order. Marathon is adamantly opposed to the sealing of the Sales Agreement on the basis that the filing of the Sales Agreement by Ruhrgas gave rise to a presumption favoring public access. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978).

Marathon concedes, as it must, that the presumption of favoring public access is not absolute. *Id.* at 598-99. However, Marathon contends that Ruhrgas has not carried its burden to show that its interest in secrecy outweighs the presumption of public access to judicial documents. *Leucadia, Inc. v. Applied Extrusion Tech., Inc.*, 998 F.2d 157, 161 (3d Cir. 1993).

In support of its motion to seal, Ruhrgas has provided affidavits which state that the Sales Agreement contains trade secrets and other confidential information concerning pricing formulas and "crucial elements of the delivery conditions." *See* Hoffmann Affidavit (Instrument #10, Exhibit A). The Fifth Circuit has indicated that information of this sort is a trade secret. *Metallurgical Indus., Inc. v. Fourtek, Inc.*, 790 F.2d 1195, 1199-1200 (5th Cir. 1986). Furthermore, the Sales Agreement itself contends a requirement that the information in it is confidential and is not to be improperly disclosed.

The Fifth Circuit has stated that "[i]n exercising its discretion to seal judicial records, the court must balance the public's common law right of access against the interests favoring nondisclosure." *S.E.C. v. Van Waeyenberghe*, 990 F.2d 845, 848 (5th Cir. 1993). In this case, the Court finds that there is little, if any, public interest in the Sales Agreement which would warrant the disclosure of its contents. When this is balanced with Ruhrgas's interest in preserving the confidentiality of the information in the Sales Agreement, the Court finds that Ruhrgas's motion to seal the Sales Agreement should be granted. In view of the Court's Memorandum and Recommendation denying Ruhrgas's motion to stay pending arbitration, it appears that there may no longer be any need to have the Sales Agreement on file with the Court. Thus, Ruhrgas shall be granted leave to withdraw the Sales Agreement now, or at a later time if appropriate.

**Motions to Stay Discovery**

Marathon has filed a motion seeking to stay all proceedings in this case pending the Court's ruling on Marathon's motion to remand. Marathon contends that this Court is without jurisdiction over the case, hence it should be remanded to Texas state court, and the Court should not rule on any of the other pending motions. Ruhrgas has filed a response in opposition (Instrument #23) to Marathon's motion to stay claiming that, in spite of the motion to remand, the Court has jurisdiction to rule on Ruhrgas's motion to dismiss for lack of personal jurisdiction. *Villar v. Crowley Maritime Corp.*, 990 F.2d 1489, 1494 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 690 (1994). Ruhrgas further contends that judicial



economy would not be promoted by staying the case pending a ruling on the motion to remand because the issues involved in the motion to remand are intertwined with the issues raised in Ruhrgas's motions to dismiss.

In spite of Ruhrgas's opposition to Marathon's motion to stay, Ruhrgas had filed a motion seeking to have the Court limit discovery to only subject matter and personal jurisdiction matters and stay all discovery in relation to the merits of the case. Marathon has filed a response in opposition (instrument #30). Marathon argues that Ruhrgas is not entitled to any discovery concerning the motion to remand because Ruhrgas should have known the basis for subject matter jurisdiction at the time it removed the case from Texas state court and Ruhrgas is not entitled to discovery on the personal jurisdiction issues because Ruhrgas should know what its contacts with Texas are without having to perform discovery. Marathon further contends that if its motion to stay pending a ruling on its motion to remand is denied, then full discovery should be permitted because of the overlap between jurisdictional discovery and merits discovery in this case.

To summarize the parties' positions, Marathon's ideal ruling is that this case be completely stayed pending resolution of the motion to remand; Ruhrgas's ideal ruling is to be allowed to pursue limited discovery on the jurisdictional issues; and Marathon's second choice is to be permitted to perform full discovery due to the interrelatedness of the jurisdictional and merits discovery. The Court is disinclined to stay the whole case pending resolution of the motion to remand. Judicial economy would be served by both limiting merits discovery pending the

resolution of the pending dispositive motions, and by allowing merits discovery related to discovery on the jurisdictional issues. Therefore, the Court concludes that both motions are granted and denied in part. Discovery is limited to the jurisdictional issues and any related merits discovery which should be performed simultaneously for reasons of judicial economy. The parties are expected, in good faith, to attempt to resolve, without judicial intervention, any gray areas.

In accordance with the foregoing, the Court

**ORDERS** that:

(1) Ruhrgas's motion to dismiss for improper service or to quash service is **DENIED as moot,** subject to being reurged should service under the Hague Convention not be effected within thirty (30) days;

(2) Ruhrgas's motion to seal the Sales Agreement is **GRANTED;**

(3) the Clerk's Office shall maintain Instrument #3 under seal pending further order from the Court.

(4) Ruhrgas is **GRANTED** leave to file a motion to withdraw the Sales Agreement;

(5) Marathon's motion to stay is **GRANTED in part** and **DENIED in part;** and

(6) Ruhrgas's motion for order deferring Rule 26(f) meeting and Rule 26(a) initial disclosures is **GRANTED;** Ruhrgas's motion for order authorizing limited discovery on subject matter jurisdiction and personal jurisdiction issues is **GRANTED in part** and **DENIED in part;** and



Ruhrgas's motion for order staying merits discovery is **GRANTED in part** and **DENIED in part.**

With respect to orders (5) and (6), discovery is limited to jurisdictional issues and any related merits discovery, which should be performed simultaneously for reasons of judicial economy. The parties are **ORDERED** to attempt, in good faith, to resolve, without judicial intervention, any gray areas between discovery on jurisdictional issues and related merits issues.

The Court further

**ORDERS** that discovery on jurisdictional issues shall be completed within sixty (60) days of the date of entry of this Order; and

**ORDERS** that submission dates for the motion to dismiss for lack of personal jurisdiction (Instrument #4), motion to dismiss for *forum non conveniens* (Instrument #8), and motion to remand (Instrument #12) shall be ten (10) days after the conclusion of the jurisdictional discovery.

**SIGNED** at Houston, Texas, this 15th day of November 1995.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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| MARATHON OIL COMPANY, MARATHON INTERNATIONAL OIL COMPANY, and MARATHON PETROLEUM NORGE A/S, | § | |
| Plaintiffs, | § | CIVIL ACTION |
| VS. | § | NO. H-95-4176 |
| RUHRGAS, A.G., | § | |
| Defendant. | § | |

**ORDER**

(Filed Jan. 12, 1996)

The Court has considered Plaintiffs' Amended Motion for Extension of Deadlines and Ruhrgas AG's Response thereto and makes the following modifications to the deadlines established by the Court's Order signed November 15, 1995 (Instrument No. 36):

1. Discovery on all personal jurisdiction and related issues must be completed by January 26, 1996.
2. The submission date for Defendant's Motion to Dismiss for lack of personal jurisdiction (Instrument No. 4), Defendant's Motion to Dismiss on ***Forum Non Conveniens*** Grounds (Instrument No. 8), and Plaintiffs' Motion to Remand (Instrument No. 12) shall be February 8, 1996.

**SIGNED** this 11th day of January, 1996.

/s/ Melinda Harmon
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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| MARATHON OIL COMPANY, MARATHON INTERNATIONAL OIL COMPANY, AND MARATHON PETROLEUM NORGE A/S, | § | |
| Plaintiffs, | § | Civil Action |
| v. | § | No. H-95-4176 |
| RUHRGAS, A.G., | § | |
| Defendant. | § | |

**MOTION FOR LEAVE TO FILE BRIEF FOR THE FEDERAL REPUBLIC OF GERMANY AS AMICUS CURIAE IN SUPPORT OF RUHRGAS**

The Federal Republic of Germany moves for leave to file an amicus brief, lodged herewith, in support of the position of Ruhrgas, A.G., in this case.

Respectfully submitted,

/s/ Thomas G. Corcoran Jr.
Peter Heidenberger
Thomas G. Corcoran Jr.
Berliner, Corcoran & Rowe
1101 Seventeenth Street, N.W.
Suite 1100
Washington, D. C. 20036
(202) 293-5555

January 15, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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| MARATHON OIL COMPANY, MARATHON INTERNATIONAL OIL COMPANY, AND MARATHON PETROLEUM NORGE A/S, | § | |
| Plaintiffs, | § | Civil Action |
| v. | § | No. H-95-4176 |
| RUHRGAS, A.G., | § | |
| Defendant. | § | |

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF FOR THE FEDERAL REPUBLIC OF GERMANY AS AMICUS CURIAE IN SUPPORT OF RUHRGAS**

On January 12, 1995, counsel for the Federal Republic of Germany, Peter Heidenberger, telephoned counsel for the plaintiffs, Clifton Hutchinson, and asked his consent to the filing of an amicus brief by Germany. Consent was refused. In consequence a written request was sent by FAX that same day. A copy is attached hereto as Exhibit 1. A reply dated January 12, but FAXed on January 15, sets out the reasons for plaintiffs' objections to Germany's proposed filing. The reply is attached as Exhibit 2.

While we recognize that the filing of the brief will impose on plaintiff the obligation to respond to Germany's arguments and add to time pressure on plaintiffs' counsel, that would be true whenever Germany chose to file. Germany's counsel assure the Court that Mr. Hutchinson was called as soon as the brief was near



completion. January 19, 1995, a week before the January 25, 1995, date for completion of briefing by the parties was chosen purposely so that plaintiffs would have an opportunity to respond to Germany's arguments. Finally, because plaintiffs' counsel have brought their time difficulties to our attention, we have cut short our process of review, scheduled to be completed early on the week of January 15, 1996, and FAXed a copy of the amicus brief to plaintiffs' counsel on January 15, 1996.

Respectfully submitted,

/s/ Thomas G. Corcoran Jr.
Peter Heidenberger
Thomas G. Corcoran Jr.
Berliner, Corcoran & Rowe
1101 Seventeenth Street, N.W.
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Washington, D. C. 20036
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January 15, 1996

IN THE UNITED STATES DISTRICT COURT
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| MARATHON OIL COMPANY, MARATHON INTERNATIONAL OIL COMPANY, AND MARATHON PETROLEUM NORGE A/S, | § | Civil Action No. H-95-4176 |
| Plaintiffs, | § | |
| v. | § | |
| RUHRGAS, A.G., | § | |
| Defendant. | § | |

**BRIEF FOR THE FEDERAL REPUBLIC OF GERMANY AS AMICUS CURIAE IN SUPPORT OF RUHRGAS**

## I. Interest of the Amicus Curiae

The Federal Republic of Germany has a vital national interest in securing an adequate and uninterrupted supply of natural gas at competitive market prices. The instant case threatens this vital national interest in two ways. First, plaintiffs have brought this case in a local rather than a federal tribunal although the case manifestly presents substantial issues of international law and foreign relations. Second, plaintiffs have attempted to circumvent the arbitration clause in the agreements to which their affiliate is a party although the clause clearly covers the controversy presented by this case. The clause requires arbitration in Europe where the controversy arose. In the view of the Federal Republic of Germany, this Court should take subject-matter jurisdiction over



this case and stay or dismiss the case in favor of arbitration or litigation in Europe to ensure that adverse consequences for international relations do not result.

## II. Statement of the Case

Plaintiffs filed this action in the 152d Judicial District Court of Harris County, Texas. Upon motion by the Defendant, Ruhrgas, A.G. (hereinafter "Ruhrgas"), the case was removed to this Court. Plaintiffs, Marathon Oil company and certain of its affiliates (hereinafter sometimes "Marathon"), filed a motion to remand the case to Texas state court. Ruhrgas opposed the motion to remand asserting that the Court had subject-matter jurisdiction over this case, and moved for a stay pending arbitration, or for dismissal on the grounds of *forum non conveniens* or lack of personal jurisdiction. The Court denied Ruhrgas' motion for a stay pending arbitration and permitted discovery on certain jurisdictional issues. Memoranda and Orders entered November 17, 1995 and January 3, 1996. Ruhrgas' motion for reconsideration of the order denying stay pending arbitration and its motions to dismiss on various grounds as well as Marathon's motion to remand are now pending for decision by the Court.

## III. The First Amended Petition and the Note Verbale

### A. The First Amended Petition

Although many of the allegations of the First Amended Petition are hotly contested, we summarize them here to show that even accepting every well-pleaded allegation in the petition, the Court has subject-matter jurisdiction, and the case should be stayed or

dismissed in favor of arbitration in a European forum. Material in parenthesis is not in the petition but otherwise supported by the record.

According to the First Amended Petition, this case "arises out of" a conspiracy among Ruhrgas, a company controlling 80% of the German market for natural gas, Statoil, the state oil and gas company of the Kingdom of Norway, and others, including Distrigaz, the state gas company of the Kingdom of Belgium, to monopolize the Western European market for natural gas. ¶¶ 6, 9, 11, and 27. A natural resource is involved, the Heimdal gas field, which is located in Norway's portion of the European continental shelf. ¶ 14. Through Statoil, Norway, with a 40% share, is the largest equity owner of the field; the second largest, with a 24% share, is Marathon. ¶¶ 14-15.

Plaintiffs are Marathon Oil Company, and certain of its subsidiaries, but not the Marathon subsidiary, Marathon Petroleum Company (Norway) ("MPCN"), that actually has a contract with Ruhrgas and other European parties to deliver natural gas from the Heimdal gas field to Western Europe (and that by way of assignment from plaintiff Marathon Petroleum Norge A/S enjoys all rights and performs all duties under the Heimdal license). ¶¶ 1-3. MPCN is referred to in the complaint only as one of Marathon's "affiliates." ¶¶ 26, 29, 32. Neither Statoil, Distrigas, the Kingdom of Norway, nor the Kingdom of Belgium, are named as defendants.

The first misrepresentation alleged in the petition is a promise by Statoil (not Ruhrgas) that the cost of the construction of a new, (majority state-owned), pipeline, referred to only as "Statpipe," could be recouped by



Marathon by means of a transportation charge of "tariff" on all gas flowing through the pipeline. ¶¶ 17-18. Statoil then brought Marathon and its co-venturers (evidently including Statoil) together with a consortium headed by Ruhrgas, which agreed to pay the venturers a formula then yielding $6.16 per mcf for the gas. ¶ 19. This agreement is the only alleged representation by Ruhrgas to Marathon that the petition describes explicitly. Based on this representation and others that are never described, Marathon allegedly advanced over $300 million for the development of the Heimdal field. ¶ 21.

At some point during the foregoing, Statoil discovered the Troll field, which was some 40 times larger than Heimdal. ¶ 22. Statoil agreed to commit the Troll gas to Ruhrgas at $2.201 per mcf and Statoil also committed to lower the Heimdal price to Ruhrgas. ¶ 23. MPCN (however, refused to go along and when a dispute as to the validity of the supply contract between MPCN and other Continental buyers arose) initiated arbitration and was successful as against Ruhrgas (and other buyers) but not against Distrigaz, the Belgian state gas company. Eventually as a result of what plaintiffs' claim to be Ruhrgas' economic coercion, they claim that MPCN had to agree to an amendment of its agreement with Ruhrgas. ¶¶ 24-29.

Although § 30 of the Petition is difficult to understand, it seems to say that in the course of renegotiating the agreement with Ruhrgas and the other European buyers, Statoil (not Ruhrgas) misrepresented that it would route the gas from the Troll field through Statpipe (the majority state-owned pipeline of the Kingdom of Norway) with the result that the tariff on Heimdal gas would decrease. ¶ 30. Early in 1995, however, Statoil

announced that it would not connect the Troll field to Statpipe. ¶ 32. But for Statoil's "misrepresentations to Marathon regarding increased shipments of gas through Statpipe and the related cost reductions," the factual portion of the Petition concludes, "[p]laintiffs would have filed this action years ago." *Id.*

### B. Germany's Note Verbale

The Federal Republic of Germany submitted its Note Verbale No. 75/95 to the United States Department of State on December 15, 1995. A copy of the note is attached hereto as Exhibit 1.

The note Verbale states in pertinent part that Germany has a strong public interest in secure and reasonably priced energy supplies. Because natural gas provides a substantial proportion of Germany's energy supplies and 80% of the gas must be imported, natural gas imports are a major issue in national energy policy. Imports from Norway are particularly important. The governments of Germany and Norway concluded bilateral treaties in 1974 and 1993 to define the sovereign powers of the two states with regard to the pipelines from the Norwegian continental shelf to the German coast. The United States has historically taken a keen interest in the energy supply situation in Europe and encouraged the development of Norway's North Sea fields as an alternative to Soviet gas. ¶¶ 4-8.

The Note Verbale further states that the United States and Germany are parties to a number of treaties implicated in the case filed by Marathon, in particular the so-



called New York Convention[1] concerning the recognition and enforcement of foreign arbitral awards. If the legal opinion came to prevail that in international trade a party to a contract can avoid binding contractual agreements, such as, in this case, prices and the arbitration clause, by having affiliated companies that are not signatories to these contractual agreements file an action for damages in a forum non conveniens and if such forum were to rule on the merits of the case, the reliability of the international legal and commercial relations would be gravely affected. ¶¶ 10-13.

## IV. Summary of Argument

Because of the critical national interest of Germany and many other European countries that are implicated in this case, weighty issues of foreign relations are presented on the face of the First Amended Petition. For this reason, this case "arises under" the Laws of the United States and this Court, that is, a federal court has subject-matter jurisdiction.

The Supreme Court has commanded that arbitration should be compelled unless the Court can be positive that the arbitration clause does not cover the dispute. This Court has already ruled that the claims in question are within the scope of the broad arbitration clause contained in the agreement. Plaintiffs nevertheless argue that they

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[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, *reprinted in* 9 U.S.C. § 201 note (West Supp. 1995) and 9 U.S.C. §§ 3 and 208.

are not bound because they are not signatories. In view of Marathon Oil's control over the subsidiary, MPCN, that is bound by the arbitration agreement and of Marathon Oil's involvement in the proceedings that led to this case, the arbitration clause should be interpreted to bind the plaintiffs.

In view of all the factors to be weighed in deciding whether this Court is a *forum non conveniens*, in particular, that most of the evidence is located in Europe, and that the law of Norway will be applied, the case should be dismissed in favor of refiling in a European forum, either arbitral or national.

Finally, because Ruhrgas has had so little contact with Texas, it would be fundamentally unfair to require it to litigate here, so the case should be dismissed for lack of personal jurisdiction.

## V. Argument

The Federal Republic of Germany supports Ruhrgas' opposition to plaintiffs' motion to remand. Germany also supports Ruhrgas' dispositive motions in this case, in particular, its motion for reconsideration of order denying motion for stay pending arbitration. Plaintiffs should not be allowed to avoid both federal jurisdiction and arbitration by the subterfuge of proffering themselves rather than MPCN as the party in interest.



### A. This Court has federal question jurisdiction over this case because the necessity for the resolution of many issues of federal law appears on the face of the well-pleaded complaint.

"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, law, or treaties of the United States." 28 U.S.C. § 1331. A case "arises under" § 1331 when it is brought to enforce a right of action created by state law, where the vindication of a right under state law "necessarily" turns on some construction of federal law. *Franchise Tax Board v. Laborers Vac. Trust*, 463 U.S. 1, 9 (1983), citing *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921). One distinguished commentator has restated the *Franchise Tax Board* test as follows:

> A case . . . "arises under" federal law . . . if it is brought to enforce a right of action created by state law, if under orderly rules of pleading and proof the plaintiff, as part of his case in chief, must establish the correctness and applicability of a proposition of federal law in order to prevail.

Hart & Wechsler, *The Federal Courts and the Federal System*, (3rd. Ed., 1988), p. 995. It is well-established that the federal issue must be "substantial." *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 813 (1986).

Although for a period in Constitutional history, the exclusively federal nature of international law was not established, "all that . . . changed when the Supreme Court decided [*Banco Nacional de Cuba v. Sabbatino*, 376

U.S. 398 (1964)]." L. Henkin, *Foreign Affairs and the Constitution*, (The Foundation Press, 1972), p. 217. In *Sabbatino*, the Supreme Court held that, due to the significance of choices ordering the United States' relationships with other members of the international community, such issues "*must* be treated *exclusively* as an aspect of federal law." *Id.*, at 425, emphasis supplied. Although *Sabbatino* dealt only with the "act of state doctrine," it is now apparent that claims raising questions of foreign relations present issues of federal common law. *See Texas Indus., Inc. v. Radcliff Materials*, 451 U.S. 630, 640 (1981); *Republic of Philippines v. Marcos*, 806 F.2d 344, 352-354 (2d Cir. 1986), *cert. dismissed*, 480 U.S. 942 (1987); *Sequiha v. Texaco, Inc.*, 847 F.Supp. 61, 62-63 (S.D. Tex. 1994); *Kern v. Jeppsen Sanderson, Inc.*, 867 F.Supp. 525, 531-532 (S.D.Tex. 1994).

In *Radcliff Materials*, the Supreme Court stated that although there was no general common law, citing *Erie v. Tompkins*, 304 U.S 64, 78 (1938), the Court had recognized the need and the authority to formulate federal common law in two areas. The first of these was where a federal rule of decision was necessary to protect uniquely federal interests, in particular, "international disputes implicating . . . our relations with foreign nations," *Radcliff Materials*, at 641. In such instances, the Court said:

> . . . our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.

*Id.*, at 640-641.



In *Marcos*, the Second Circuit held that there was federal question jurisdiction over actions having important foreign policy implications, citing the Supreme Court in *Merrell Dow, supra*, at 810, to the effect that in "close" cases the federal court should assume jurisdiction where the federal foreign relations interest was sufficiently important. *Marcos* at 353. The Court noted that in some areas of law, federal law was so powerful as to preempt entirely any state cause of action. The Court ruled that the federal common law in the area of foreign affairs was "probably" sufficiently powerful to displace the state cause of action presented in that case. Federal jurisdiction was present in any event because the claim raised, as a necessary element, the question whether to honor the request of a foreign government that the American courts enforce the foreign government's directives to freeze property in the United States subject to future process in the foreign state. *Marcos* at 354.

In *Sequiha*, residents of Ecuador asserted a variety of causes of action in this Court arising out of pollution accompanying petroleum development in that country. Chief Judge Black noted that the conduct in question was regulated by the Republic of Ecuador, which owned the land in issue and treated all petroleum exploration as a public utility controlled by the government. He also noted that the Government of Ecuador had officially protested the litigation, as the Federal Republic of Germany has in its Note Verbale of December 15, 1995. The Court held that such matters affected international law and the relationship between the United States and foreign governments and gave rise to federal question jurisdiction. *Sequiha* at 62.

The *Sequiha* court dismissed the case on the basis of the comity of nations and the doctrine of *forum non conveniens*. The Court noted that under the doctrine of comity a court should decline to exercise jurisdiction under certain circumstances in deference to the laws and interest of a foreign country. Because, among other things, the challenged activity and alleged harm had occurred entirely in Ecuador, the challenged activity was regulated by the Republic of Ecuador, the exercise of jurisdiction would interfere with Ecuador's sovereign right to control its own environment and resources, and the Republic of Ecuador had expressed its strenuous objection to the exercise of jurisdiction by the Court, the case was dismissed under the doctrine of the comity of nations. *Id.* at 63. The Court also dismissed on the basis of *forum non conveniens*. *Id.* at 63-65.

In *Kern*, Chief Judge Black again addressed whether the Court had subject-matter jurisdiction over a controversy involving foreign states and acts taking place in foreign countries. In that case air crashes took place in Nepal involving aircraft built by Airbus Industrie, a company which is majority owned by foreign sovereigns. The Court ruled that there was federal question jurisdiction in the case because the resolution of plaintiffs' state law claims depended on the interpretation of certain United States treaties. Alternatively, the Court held that there was also federal question jurisdiction because plaintiffs' claims raised questions of foreign relations which were incorporated into federal common law. "The fact that foreign countries [were] not specifically named in the lawsuit [was] immaterial." "Since the interests of foreign countries in the litigation are substantial," this Court



concluded, "there was federal question jurisdiction." *Kern*, 867 F.Supp. at 531-532.

As explained at length in the Note Verbale it is entirely clear, using Chief Judge Black's formulation of the standard in *Kern, supra*, that the interests of the Federal Republic of Germany in this litigation are substantial. It is equally clear, as the Supreme Court put it in *Radcliff Materials*, that this case presents an international dispute "implicating . . . our relations with foreign nations." *Id.* at 641.

The first substantial interest is Germany's interest in secure and reasonably priced energy supplies. Note Verbale, paras. 3-8. A state, 80% of whose natural gas is imported, must view the security of its gas supply as an important concern. The elaborate legal system fashioned by the producing and consuming European states to address this problem is testimony to its importance. Note Verbale, paras. 10-14.

Second, the Court can take judicial notice that this case presents delicate problems of foreign relations with the Kingdom of Norway. Because decisions of the case will call into question decisions of the Kingdom of Norway, made by its state-owned oil company, Statoil, and state-owned pipeline, Statpipe, within its territorial boundaries, the foreign relations problems that led to the creation of the act of state doctrine are implicated. *See, Sabbatino*.

Third, the issue whether Marathon may escape international arbitration takes on a different coloration when viewed as implicating the relations of the United States with foreign nations. It is well established that the mere

existence of an issue whether the New York Convention applies, does not confer federal question jurisdiction. *Prudential-Bache Securities, Inc. v. Fitch*, 966 F.2d 981, 989 (5th Cir. 1992). When viewed, however, as an issue in United States foreign relations with Europe, it is a candidate for the "substantial federal issue" required for subject-matter jurisdiction. Because as set out in the Note Verbale, it is the custom of European countries, in particular the Federal Republic of Germany and the Kingdom of Norway, to resolve issues concerning natural gas contracts via arbitration, interference by a United States court in this process does, we respectfully submit, raise a significant issue of foreign relations and as a result provides subject-matter jurisdiction in this case.

Because all of the foregoing issues of foreign relations appear on the face of the First Amended Petition and require the Court to resolve substantial issues of federal law, this Court has subject-matter jurisdiction.

**B. The New York Convention requires that this dispute be submitted to arbitration.**

The Federal Republic of Germany respectfully submits that this Court should grant Ruhrgas' motion for reconsideration of its order denying motion for stay pending arbitration. The Court denied Ruhrgas motion for stay on the ground that the plaintiffs themselves had not consented to arbitration and that they were not obligated to arbitrate as a result of their relationship with MPCN. November 17, 1995, Memorandum and Order, Instrument #38, pp. 4-11.



We respectfully submit, however, that the affidavits and correspondence submitted by Ruhrgas and the deposition testimony of plaintiffs' employees, John Alvins Evans and Burton Bossley,[2] support Ruhrgas' position that MPCN was controlled by the plaintiffs, Marathon Oil Company (MOC) and its subsidiary Marathon International Oil Company (MIOC). MOC and MIOC owned the stock of MPCN and controlled the negotiations leading to the agreement signed by MPCN to develop the Heimdal filed [sic] that included the arbitration clause. There is no indication in the record that MPCN had employees of its own. Such employees were not necessary because negotiations and supervision were performed by employees of the plaintiffs. Employees of MOC and MIOC stated in affidavits that they were members of the MOC team which conducted the negotiations and that they executed the agreements for the exploration of the Heimdal field on behalf of MPCN. Evans Deposition, pp. 6-8, 24-33; Bossley Deposition, pp. 15-33.

All decisions concerning the development of the gas fields were made by the parent corporation. Whenever a new area was to be explored, a geographical subsidiary would be set up, such as Marathon France, Marathon Germany, or, as in the instant case, Marathon Norway. The subsidiaries required few or no employees, because all of the work was done by employees of the plaintiffs who were then assigned to the respective subsidiary to perform such tasks as directed by the plaintiffs. Evans Deposition, pp. 24-33.

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[2] Exhibits 2 and 6 to Ruhrgas' Motion for Reconsideration.

In *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), the Supreme Court ruled that an agreement by the parties to arbitrate any dispute arising out of their international commercial transaction was to be enforced in accordance with the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, in a case involving securities fraud. The Court did so although in *Wilko v. Swann*, 346 U.S. 346 (1953), it had refused to enforce the arbitration clause in another case involving securities fraud where the dispute was not international. In *United Steelworkers v. American v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-583, (1960), the Court said that arbitration must be compelled unless the court can say with "positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute." In short, there is a "liberal federal policy favoring arbitration agreements," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985), quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983), especially in cases involving international commerce.

The New York Convention, *supra*, states in pertinent part that "[i]f any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement. . . . " 9 U.S.C. § 3. The United States statute that puts the New York Convention into effect provides that "[w]here the



subject matter of an action or proceeding pending in a State court *relates* to an arbitration agreement or award falling under the Convention, the defendant . . . may . . . remove such action or proceeding" to federal court. 9 U.S.C. § 205, emphasis supplied.

We ask the Court to note at this point that the only alleged misrepresentation by Ruhrgas that is explicitly set out in the petition is the representation embodied in the agreement that Ruhrgas would pay for Heimdal gas based on a formula then yielding $6.16 mcf. First Amended Petition, ¶ 21. The alleged breach of that agreement has already been a subject of arbitration. § 24-29. Though phrased in tort rather than breach of contract terms, the injury alleged in this case is economically the same injury that was the subject of the arbitration described in the petition. Marathon and its affiliates claims that they advanced money to develop the Heimdal field on the representation, embodied in the agreement, that they would be compensated by the $6.16 formula. The measure of damages, whether the cause of action is expressed as a tort or a breach of contract, can only be the difference between what the agreement promised Marathon and what Marathon has received or will receive. This precise issue has already been decided by arbitration. First Amended Petition, ¶ 26. It follows that the cause of action set out in the petition "relates," as 9 U.S.C. § 205 states, to the arbitration. It relates because the underlying injury is identical.

The issue presented is best characterized not as whether plaintiffs have agreed to submit any claim against Ruhrgas to arbitration, but whether under the circumstances of this case, the plaintiffs as affiliates of

MPCN are bound by the arbitration clause agreed to by MPCN.

As Ruhrgas has accurately pointed out to the Court:

> The coverage of the arbitration clause set out in Article 15 of the Agreement is very broad, covering "[a]ll claims, disputes, and other matters arising out of or relating to this Agreement. . . . " The Fifth Circuit has stated that when the parties agree to such a broad clause, "they intend their clause to reach all aspects of the relationship." *Valentine Sugar Inc. v. Donau Corp.*, 981 F.2d 210, 213 n.2 (5th Cir. 1993), *cert. denied*, 113 S.Ct. 3039 (1993). Such a broad clause covers not only contract claims, but tort claims which "arise out of the business relationship between the opposing parties." *Snap-On tools Corp. v. Mason*, 18 F.3d 1262, 1265 (5th Cir. 1994).

Ruhrgas Memorandum in Support of Motion for Stay Pending Arbitration, p. 6. There can be no doubt that the issues placed in dispute by the plaintiffs in this case arise out of the same business relationship as the issue of the price to be paid for gas from the Heimdal field that has already been the subject of arbitration between MPCN and the Consortium. This Court has so ruled. Memorandum and Order entered November 17, 1995, Instrument #38, p. 4, n. 3.

Marathon's response to this argument is that only its affiliate, MPCN, not Marathon Oil or any of the other named plaintiffs, signed the agreement with the arbitration clause. Marathon's Response to Ruhrgas' Motion to Stay Arbitration, pp. 3-12. However, as Ruhrgas replied, Ruhrgas Motion for Reconsideration, pp. 6-14, citing *Dow Chemical v. Isover Saint Gobain*, Cour d'Appel, Paris, 21



October 1983, 110 J.899 (1983) IX Yearbook 131 (1984), a precedent under the Rules of Conciliation and Arbitration of the International Chamber of Commerce ("ICC") in Paris, where a parent company has exercised control over a subsidiary having signed the relevant contract or participated in its negotiation, performance, and/or termination, the whole group of companies is bound by the arbitration clause in the agreement. *Dow Chemical* is one of a line of awards rendered by arbitral tribunals acting under the auspices of the ICC that have come to this conclusion. *See* ICC matter No. 1434, award of 1975, 103 J. du Droit Int'l 978-980 (1976); ICC matter no. 2375, award of 1975, 103 J. du Droit Int'l 973-974 (1976); *see also* ICC matter no. 3493, award of March 11, 1983, 22 I.L.M. 752, 761-67 (1983); ICC matter no. 5103, award of 1988, 115 J. du Droit Int'l 1205 (1988); ICC matter no. 5730, award of 1988, 117 J. du Droit Int'l 1029 (1990); ICC matter no. 6519, award of 1991, 118 J. du Droit Int'l 1065 (1991). Precedent from arbitration under the auspices of the ICC should be given great weight in this case because the arbitration clause in issue specifies that arbitration will be governed by the ICC rules. As a consequence, pursuant to the arbitration clause in Article 15 of the agreement between Ruhrgas and MPCN, the issues presented by the instant case are also required to be submitted for arbitration.

### C. This Court should dismiss on the ground of forum non conveniens in favor of a European forum.

Germany has little to add to the argument made by Ruhrgas in its motion to dismiss on the ground of *forum*

*non conveniens*, except to say that there clearly are adequate and more convenient forums in Europe, and since Marathon's affiliate has agreed to ICC arbitration in Sweden, and Sweden is a neutral forum as among United States, German, and Norwegian litigants, arbitration in Sweden may be the most favored location to resolve this dispute.

### D. Alternatively, the Court should dismiss for lack of personal jurisdiction.

Germany also has little to add to the arguments made by Ruhrgas in its motion to dismiss for lack of personal jurisdiction. Germany supports that motion. Germany suggests in addition only that the lack of contacts between Ruhrgas and the United States would also support dismissal on the ground of *forum non conveniens* to allow resolution of this dispute in a European forum, whether arbitral or national.



## CONCLUSION

For the foregoing reasons, the motion to remand should be denied. The case should then be stayed pending arbitration or dismissed on the ground of *forum non conveniens* or for lack of personal jurisdiction.

Respectfully submitted,

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January 19, 1996

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

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| **MARATHON OIL COMPANY, MARATHON INTERNATIONAL OIL COMPANY, AND MARATHON PETROLEUM NORGE A/S,** | ) | |
| **Plaintiffs,** | ) | **CIVIL ACTION** |
| **vs.** | ) | **NO. H-95-4176** |
| **RUHRGAS, A.G.,** | ) | |
| **Defendant.** | ) | |

**ORDER**

(Filed Jan. 26, 1996)

Pending before the Court is the Federal Republic of Germany's Motion for Leave to File Brief for the Federal Republic of Germany as Amicus Curiae in Support of Ruhrgas (Instrument #58). The Court is aware that the Marathon plaintiffs are opposed to this motion as apparent from the plaintiffs' counsel's letter to the movant's counsel dated January 12, 1996. The plaintiffs' main reason for opposing the filing of the amicus brief is the time restraint in filing a response to the movant's brief.

The pending jurisdictional motions are to be submitted to the Court for consideration on February 8, 1996. The movant herein has attached its amicus brief to the instant motion. The Court finds that leave to file an amicus brief should be granted and plaintiffs should be given until February 8, 1996 to file any response thereto, if necessary. Therefore, the Court



**ORDERS** that the Federal Republic of Germany is **GRANTED** leave to file an amicus brief in this action; and further

**ORDERS** that the plaintiffs shall have until February 8, 1996 to file any response to the amicus brief.

**SIGNED** at Houston, Texas, this 24th day of January 1996.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

NO. H-95-4176

IN THE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

---

MARATHON OIL COMPANY,
MARATHON INTERNATIONAL OIL COMPANY, and
MARATHON PETROLEUM NORGE A/S

*Plaintiffs,*

vs.

RUHRGAS, A.G.

*Defendant.*

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# PLAINTIFFS' RESPONSE TO RUHRGAS, A.G.'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

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| **Defendant.** | § | |

**PLAINTIFFS' RESPONSE TO RUHRGAS AG'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION**

Subject to their previously filed motion to remand, Plaintiffs file the following response to Defendant Ruhrgas' motion to dismiss for lack of personal jurisdiction pursuant to Federal Rule 12(b)(2).

## SUMMARY OF ARGUMENT

There is no basis for Ruhrgas' assertion that it is not subject to personal jurisdiction in Texas. To the contrary, volumes of evidence plainly show that this Court could exercise both specific and general jurisdiction over Ruhrgas, assuming subject matter jurisdiction also existed.[1] Representatives of Ruhrgas traveled to Houston, Texas on at least three occasions to discuss matters relating to the Heimdal field with representatives of the Plaintiffs. This fact alone is sufficient to establish specific jurisdiction over Ruhrgas, given that Plaintiffs' claims concern their on-going investment in the Heimdal field. Ruhrgas also sent numerous faxes, telexes and letters to Plaintiffs in Houston, and directed many phone calls to them here as well. Finally, Ruhrgas' fraudulent conduct was aimed at MOC and MIOC in Texas, and forseeably injured those plaintiffs in Houston, Texas. Plainly, there is sufficient evidence for the Court to exercise specific jurisdiction over Ruhrgas in this case.

Even ignoring Ruhrgas' substantial specific jurisdictional contacts with Texas, the evidence also establishes that Ruhrgas is present in Texas (and in Houston) on a continuous and systematic basis such that it should reasonably expect that it might be haled into a Texas court. For example, Ruhrgas has maintained employees in Houston *every day* since at least 1994, and on a continuous basis since 1992. It pays its employees stationed here;

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[1] Plaintiffs contend that this Court lacks subject matter jurisdiction over their claims (all of which are based on Texas state law), and have moved to remand the action. That motion still is pending.



provides them with funds for private schools and housing; and provides them with insurance and pension benefits while they are here. Ruhrgas also owns a substantial stake (worth at least $42 million) in Houston-based Teneco Energy Resources Corporation ("TERC"), and actively participates in the management of that corporation. Several of Ruhrgas' key executives attend no fewer than twelve business meetings in Houston every year, not to mention attendance at seminars and the like in Texas.

Among other things, Ruhrgas' active participation in TERC provides Ruhrgas with invaluable information and experience regarding the U.S. gas market, which Ruhrgas considers important to its own business. Ruhrgas has even signed contracts with TERC in Houston that provide for the application of Texas law in the event of any dispute. Ruhrgas also purchases thousands of dollars worth of goods and services from various Texas-based companies, and has done so for over twenty years. Thus Ruhrgas has established substantial, continuous and systematic contacts with Texas, and has purposely availed itself of the benefits of doing business in Texas on many occasions. With employees actually living and working in Houston, executives here on average every month, and numerous contracts and purchase orders with Texas residents, Ruhrgas can hardly argue that it could not anticipate being haled into court in this State.

It is difficult to understand how Ruhrgas can claim with a straight face that it is not subject to personal jurisdiction in Texas in light of the multitude of business contacts it has with this State. Regardless of its motives, however, its motion to dismiss for lack of personal jurisdiction should be denied.

## ARGUMENT

### I. THE APPLICABLE LEGAL STANDARDS

This case presents somewhat of a jurisdictional anomaly. The Plaintiffs contend that this Court does *not* have subject matter jurisdiction over their claims, and that the action should be remanded to the State court in which it originally was filed. Ruhrgas has asserted, however, that it is not susceptible to personal jurisdiction in any Texas court. Thus, Plaintiffs are placed in the unusual position of demonstrating why Ruhrgas is subject to personal jurisdiction in Texas, even though they contend this Court ultimately lacks subject matter jurisdiction over the case.

#### A. Motions to Dismiss

Despite this case's unusual posture, the standards governing a motion to dismiss are well settled and familiar. Ultimately, the plaintiff bears the burden of establishing jurisdiction over the defendant. *Bullion v. Gillespie*, 895 F.2d 213, 216-17 (5th Cir. 1990); *WNS, Inc. v. Farrow*, 884 F.2d 200, 203 (5th Cir. 1989). However, the plaintiff need only make out a prima facie case in this regard; proof by a preponderance is not required. *Union Carbide Corp. v. UGI Corp.*, 731 F.2d 1186, 1189 (5th Cir. 1984); *Jetco Elec. Indus., Inc. v. Gardiner*, 473 F.2d 1228, 1232 (5th Cir. 1973). When considering a motion to dismiss, all allegations of the plaintiff's complaint must be taken as true unless they are specifically controverted by opposing affidavits. *D.J. Inv., Inc. v. Metzeler Motorcycle Tire Agent Gregg, Inc.*, 754 F.2d 542, 546 (5th Cir. 1985). Furthermore,



all factual conflicts must be resolved in the plaintiff's favor. *Id.*

#### B. Specific vs. General Personal Jurisdiction

Ruhrgas has been served under the Texas Long-Arm Statute. Tex. Civ. Prac. & Rem. Code §§ 17.041-17.045. Because that statute extends to the full constitutional limits, *Hall v. Helicoptero Nacionales de Columbia, S.A.*, 638 S.W.2d 870, 872 (Tex. 1982), *rev'd on other grounds*, 466 U.S. 408 (1984), this Court need only consider whether the exercise of jurisdiction over Ruhrgas satisfies the two-fold requirements recognized under the Due Process Clause: First, that Ruhrgas has "certain minimum contacts" with the forum (for present purposes, Texas); and, second, that the exercise of personal jurisdiction will "not offend the traditional notions of fair play and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

The minimum contacts prong may be satisfied in one of two ways. First, the defendant may be called to answer where it has had "continuous and systematic" contacts with the forum, in which case "general jurisdiction" is said to exist. *Helicopteros*, 466 U.S. at 414-15. Alternatively, when the cause of action arises from or relates to the contact, even a single, deliberate contact with the forum will support "specific jurisdiction." *E.g., Micromedia v. Automated Broadcast Controls*, 799 F.2d 230, 234 (5th Cir. 1986) (describing specific jurisdiction); *Keller v. Millice*, 838 F. Supp. 1163, 1167 (S.D. Tex. 1993). As the Third Circuit recently explained: "Unlike establishing general jurisdiction, where the party must be shown to have

'maintained continuous and substantial forum affiliations,' establishing specific jurisdiction . . . requires only that a party be shown to have committed at least one act in the forum which is substantially related to the claim being adjudicated." *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1559 (3d Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 480 (1994).

### C. Physical Presence is Not Required, But is Significant

Physical presence in the forum State is not required to establish specific jurisdiction. *See Burger King*, 471 U.S. at 476, 479-80; *Vault Corp. v. Quaid Software Ltd.*, 775 F.2d 638, 640 (5th Cir. 1985); *Brown v. Flowers Indus., Inc.*, 688 F.2d 328, 333 (5th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983); *Product Promotions, Inc. v. Costeau*, 495 F.2d 483, 496 (5th Cir. 1974) ("contact by mail alone can be sufficient"). In *Burger King*, for example, the Supreme Court upheld jurisdiction over defendant Rudzewicz even though he had no physical contact with the forum. *See also Product Promotions*, 495 F.2d at 495-96 (finding jurisdiction in Texas despite fact that Defendant had never visited Texas and supposed locus of events was in Europe). Nevertheless, "territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there." *Burger King*, 471 U.S. at 476; *Burnham v. Superior Court*, 495 U.S. 604, 637-38 (1990) (Brennan, J., concurring) ("By visiting the forum State, a transient defendant 'avails' himself of significant benefits provided by the state.").



As is demonstrated below, Ruhrgas' own testimony and papers reveal that it has sufficient contacts with Texas to satisfy both the specific and general jurisdictional standards. Furthermore, an exercise of personal jurisdiction over Ruhrgas by a Texas court would be "fair" in light of the facts of this case.

The Court must consider as true the following allegations, all of which Ruhrgas has not controverted:[2]

1. That Ruhrgas participated in a conspiracy with Statoil and other Consortium members to monopolize the Western European natural gas market [Petition at ¶12];
2. That pursuant to this conspiracy, it sought to induce Plaintiffs to invest money to develop the Heimdal field and to underwrite the costs of a pipeline from that field to a Ruhrgas-controlled distributing system in Emden, Germany [Petition at ¶13, 18 19];
3. That it promised to pay a premium price for Heimdal gas if Plaintiffs would invest in the development of the Heimdal field and underwrite the costs of constructing a pipeline to Emden [Petition at ¶19];
4. That at the time it made that promise, Ruhrgas never intended to pay a premium price for Heimdal gas, but only made the promise to induce Plaintiffs to fund the

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[2] Even assuming that Ruhrgas could, in good faith, deny the existence of some of these facts, the burden at this preliminary stage is simply to make out a *prima facie* case. Any contested questions of fact would have to be resolved in favor of exercising jurisdiction. *WNS, Inc. v. Farrow*, 884 F.2d 200, 203 (5th Cir. 1989).

development of the Heimdal field [Petition at ¶20-21, 38];

5. That it never disclosed to Plaintiffs (a) that it was attempting with Statoil and the Consortium to monopolize the gas market, (b) that connecting the Heimdal filed [sic] to Emden was part of this attempted monopolization, (c) that it never intended to pay the promised premium price for gas, or (d) that it had agreed with Statoil not to transport gas from the Troll field through the Heimdal field (thereby preventing the tariff reduction Statoil had projected) [Petition at ¶21, 30-32]; and

6. That the Plaintiffs advanced hundreds of millions of dollars to develop the Heimdal field as a foreseeable result of Ruhrgas' omissions and representations [Petition at ¶21, 39].

Based on these facts, the Court must assume the existence of a conspiracy and that Ruhrgas fraudulently induced Plaintiffs to advance millions of dollars for the development of the Heimdal field. Ruhrgas primary defense, then, is that even if its conduct was wrongful, it occurred outside of the United States and Ruhrgas never could have anticipated being sued in Texas regarding such conduct. The facts, however, clearly demonstrate otherwise.



## III. RUHRGAS' SPECIFIC JURISDICTIONAL CONTACTS WITH TEXAS

### A. Ruhrgas' Tortious Conduct Occurred, at Least in Part, in Texas

Specific jurisdiction is present where there is a relationship between the defendant, the forum, and the litigation. *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 772 (5th Cir. 1988). In this Circuit, it is well settled that where the defendant knowingly and purposefully enters the forum for the purpose of transacting business that relates to subsequent litigation there, the exercise of specific jurisdiction is proper. *E.g., Id.* at 772; *Keller*, 838 F. Supp. at 1167. In this case, specific jurisdiction unquestionably exists because Ruhrgas has had plentiful contacts (both in person and through correspondence) with Plaintiffs in Texas relating specifically to the subject matter of this lawsuit.

#### 1. Ruhrgas Attended Meetings in Texas Regarding the Subject Matter of this Lawsuit

On three separate occasions, Ruhrgas representatives *actually traveled to Houston* to meet with representatives of the Plaintiffs concerning the Heimdal field. Wolf-Dietrich Hoffmann, Ruhrgas' head of purchasing for North Sea contracts, conceded as much during his deposition:

Q. Didn't you have a meeting in Houston?

A. We had a meeting in Houston with Marathon in February of '87.

. . .

Q. And the purpose of your meeting in Houston was to discuss the Heimdal project?

A. Yes.

Q. And you met with a number of Marathon personnel?

A. Yes.

Q. And in addition to their MPCN hats,[3] you were aware that they also wore hats for other Marathon companies, such as MIOC and MOC?

A. Not necessarily. It was as it always was, Marathon had multifunctional hats.

Q. And the persons you met with in these meetings in Houston had multifunctional hats?

A. Yes.

Hoffmann Deposition at 177:25-178:21 (attached as Exhibit 1). Significantly, it was at this 1987 meeting that Ruhrgas announced for the first time that it would not pay the promised premium price for Heimdal gas, and declared that its Gas Sales Agreement with MPCN was invalid. Hoffmann Deposition at 181:3-183:13. Notes of this meeting, and the two other Houston meetings, are attached as Exhibit 2. Plaintiffs allege that Ruhrgas promised a premium price in 1981 to induce them to loan funds for the development of the Heimdal field, but

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[3] Hoffmann previously had testified that "the Marathon people always had many hats, several at one time sometimes," and that one of those hats was Marathon Oil Company, and one was Marathon International Oil Company. Hoffmann Deposition at 138:1-13.



never intended to pay that price. The 1987 Houston meeting occurred after the field already had been developed, after the pipeline to Ruhrgas' Emden facility had been completed, and after all of Plaintiffs' money had been spent. The announcement at this meeting was, therefore, the culmination of the first part of Ruhrgas' plan with its co-conspirators. This contact alone would be sufficient to establish specific personal jurisdiction over Ruhrgas, but additional contacts abound.

After discussing the 1987 Houston meeting, Dr. Hoffmann went on to discuss *another* meeting in Houston:

Q. And then after the arbitration, you had another meeting in Houston?

A. In November, 1989, yes.

. . .

Q. And was that meeting also related to Heimdal?

A. Yes.

Q. And you met again with Marathon personnel who wore multiple hats?

A. Yes.

Hoffmann Deposition at 178:25-179:13. He then continued discussing *yet another* Houston meeting:

Q. And you had a second meeting – I mean a third meeting in 1990, in Houston?

A. Yes.

. . .

Q. And the subject of that meeting was the Heimdal project and dealings between Marathon and Ruhrgas?

A. Again, with the note that it was not Ruhrgas, but Ruhrgas in connection with the other buyers.[4]

Q. And you met again with Marathon personnel who wore multiple hats?

A. Yes.

Q. But Ruhrgas personnel did attend, correct?

A. Yes, the three gentlemen I named.

Hoffmann Deposition at 179:14-180:6. These latter two meetings were part of the second half of Ruhrgas' and Statoil's plan: to string Plaintiffs along, and obtain additional development funds, with the promise that additional gas from the Troll field would be directed through Heimdal, thereby reducing Plaintiffs' costs even if they were not paid the premium price. Plaintiffs allege that at the time of these meetings, Ruhrgas and Statoil already planned to route the Troll gas around Heimdal; that Statoil nevertheless continued sending Plaintiffs projections showing that Troll gas would be routed through Heimdal, thereby reducing tariff rates; and that Ruhrgas never disclosed these facts to Plaintiffs. *See* Petition at ¶30-32, 52-53. Thus, these meetings directly relate to the allegations of this lawsuit as well.

It is undisputed that Ruhrgas never told Plaintiffs during any of these meetings of its monopolistic plans, of

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[4] Hoffmann's reference to the "other buyers" refers to the Consortium. *See* Hoffmann Deposition at 180:20-181:1.



its true relationship with Statoil, of its plans with Statoil to route Troll gas around Heimdal, or that it never had intended to pay a premium price for Heimdal gas even though it had promised to do so to induce Plaintiffs to develop the Heimdal field.

### 2. Ruhrgas Sent Mountains of Correspondence to Plaintiffs in Texas

In addition to these three Houston meetings, Ruhrgas produced hundreds of documents evidencing correspondence between Ruhrgas and the Plaintiffs relating to the Heimdal project. Exhibit 3 is a collection of a portion of this correspondence, all of which is between Ruhrgas and MOC or NEOC in Houston (as opposed to MPCN in Norway or Houston). *See Kultur Int'l Films, Ltd. v. Covent Garden Pioneer, FSP. Ltd.*, 860 F. Supp. 1055, 1061-62 (D.N.J. 1994) (explaining significance of such communications in the context of modern commercial transactions). Ruhrgas also telephoned Plaintiffs in Houston on numerous occasions.[5] As with the meetings referred to above, it is undisputed that Ruhrgas never told Plaintiffs in any of this correspondence of its true plans and motivations relating to the Heimdal field. These activities, like the Houston trips, are directed [sic] related to

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[5] Hoffmann confirmed that he personally called Marathon personnel in Houston on average four times a year over a fifteen year period, and acknowledged that other Ruhrgas representatives made similar calls. Hoffman Deposition at 141:21-142:10. Notes of a few of these calls are attached as Exhibit 4. Such phone calls plainly provide specific jurisdictional contacts. *See Burger King*, 471 U.S. at 481; *Brown*, 688 F.2d at 333; *Product Promotions*, 495 F.2d at 496.

the instant litigation, were purposefully directed at Texas, and can in no way be characterized as the "random," fortuitous" or "attenuated." *Burger King*, 471 U.S. at 479-81 (finding sufficient contacts with Florida where defendant knew decision-making authority was based there and effects of torts related to contract would be felt there). Thus, this is not a case where the defendant has merely introduced a product into the stream of commerce (*Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 114 (1987)) or where the only contact with the forum was the result of the plaintiffs having traveled there. *World-wide Volkswagen v. Woodson*, 100 S. Ct. 559 (1980).

In specific jurisdiction cases, the Fifth Circuit has consistently upheld jurisdiction based on a single, deliberate contact with the forum related to the subject matter of the action. *E.g.*, *Brown*, 688 F.2d at 333 (finding jurisdiction based on single telephone call to forum); *see also Burger King*, 471 U.S. at 476 n.8 (1985) (noting a single act may be sufficient). Here, Ruhrgas has far more than a single, deliberate contact within the forum boundaries. Given that part of this case is based on fraudulent omissions and misrepresentations that occurred during these Houston meetings, phone calls, and correspondence, this case presents the classic specific jurisdiction fact pattern.

### 3. Ruhrgas' "MPCN" Defense is Belied by the Evidence

Ruhrgas' only response to the overwhelming evidence of its direct Texas contacts relating to this suit is to argue that these contacts exclusively were between Ruhrgas and MPCN – not Plaintiffs. To this end, Ruhrgas



evidently claims it had no idea that MOC and MIOC were providing the funding for the Heimdal project. Indeed, Ruhrgas implies that it entered a Gas Sales Agreement with MPCN that it knew would require the expenditure of hundreds of millions of dollars without the slightest interest in how MPCN would obtain the funds necessary to comply with its obligations. *See* Hoffmann Deposition at 123-24.

Despite its current lapse of corporate recollection, it seems clear that Ruhrgas was well aware of MOC's and MIOC's interest in MPCN's Heimdal operations. For example, Ruhrgas admitted that it loans money to its own subsidiaries to fund projects.[6] Hoffmann confirmed that Marathon representatives told him that if Marathon were forced to reduce its gas price to the level Statoil had agreed, it would lose $500 million.[7] Hoffmann later admitted that if a Ruhrgas affiliate suffered a $500 million loss, the upper management of Ruhrgas certainly would be concerned.[8]

Additionally, Exhibit 7 contains numerous instances of Ruhrgas addressing correspondence to MPCN, then copying one of the Plaintiffs in Houston to advise it of the same information. Unless Ruhrgas knew Plaintiffs were funding the project, there would have been no reason to send them copies of such correspondence. Indeed, the documents included in Exhibit 8, which were produced

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[6] *See* excerpt of Ruhrgas' 1988 annual report (attached as Exhibit 5), and Bentzien Deposition at 75:24-76:15) (attached as Exhibit 6).

[7] Hoffmann Deposition at 188:9-13.

[8] *Id.* at 195:9-11.

from Ruhrgas' own records, show that Ruhrgas conducted comprehensive research into the corporate structures of MOC and United States Steel Corporation (MOC's parent). As previously mentioned, Hoffmann admitted that when meeting with MOC representatives negotiating for MPCN, he knew those representatives wore "multifunctional hats," including MOC and MIOC "hats." He also confirmed that he knew one method for MPCN to fund its Heimdal operations would be to borrow the money from its parent company.[9]

Finally, when asked about the hundreds of millions of dollars required to develop the Heimdal field, Hoffmann stated that "for Marathon that need not have been a great amount of money." Hoffmann Deposition at 107:24-108:2. When asked why not, he replied "because Marathon is in the oil and gas production and exploration business and in that business, it's not such a great amount of money." MPCN, of course, is *not* in the oil and gas production business except for its Heimdal operations, none of which had started at the time the Heimdal field was developed. Thus, Hoffmann at least implicitly acknowledged that he knew Plaintiffs (*i.e.* "Marathon"), not MPCN, were the ultimate source of funding for the Heimdal field's development. Likewise, Gerhard Enseling, Ruhrgas' head of gas purchasing, conceded that he knew from the start that the Heimdal project would have to be approved by the Marathon parents, the Plaintiffs here. Enseling Deposition at 39-41 (attached as Exhibit 9). In any event, evidence such as that outlined above confirms the forseeability of Plaintiffs' funding, and at the

[9] *Id.* at 117:25-118:10.



very least raises a sufficient factual question to defeat a motion to dismiss.

### 4. Ruhrgas' Authorities are Inapposite

As Ruhrgas acknowledges, the personal jurisdiction determination must be based on the peculiar facts of each case. Ruhrgas Mem. at 6. But Ruhrgas then goes on to selectively highlight *some* of its contacts with Texas and draws supposed parallels with other cases. *Id.* at 9-14. To the extent these cases demonstrate anything helpful to the inquiry in this case, however, they confirm the legal principle that should be obvious: that multiple contacts related to a pending action satisfy the due process requirement.[10]

*WNS, Inc. v. Farrow*, 884 F.2d 200 (5th Cir. 1989), which Ruhrgas does not cite or discuss, is particularly

[10] Ruhrgas discusses three Fifth Circuit cases where the defendants' contacts were found to be lacking. For example, Ruhrgas relies on the holding in *Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061 (5th Cir.), *cert. denied*, 506 U.S. 867 (1992), and correctly points out that defendant Total Exploration could not be called to answer a third-party complaint. Unlike Ruhrgas, however, Total Exploration had never once visited Texas. Ruhrgas Mem. at 9. Likewise, the defendant in *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 773 (5th Cir. 1988), unlike Ruhrgas, had no connection to the forum relating to the action apart from the fact that the plaintiff happened to reside there. Ruhrgas' third citation, *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026 (5th Cir. 1984) was a contract action in which the parties had bound themselves to another state's law. Of course, as Ruhrgas admits, this fact materially affects the jurisdictional analysis. *E.g., Holt Oil & Gas Corp.*, 801 F.2d at 778.

instructive. There, the Fifth Circuit found sufficient contacts to require the defendants, the Farrows, to answer in Texas, despite contacts far less substantial than those involved here. In that case, WNS, a Texas corporation located in Houston, licensed the "Deck the Walls" trade name to Mrs. Farrow under a franchise arrangement. Mr. Farrow then opened a "Deck the Walls" store in Georgia. The Farrows' physical contact with Texas consisted of a single joint visit to Houston for the purpose of meeting with WNS employees to negotiate and structure a franchise agreement and a subsequent training session attended only by Mrs. Farrow. *Id.* at 201. When WNS learned that Mr. Farrow had been operating a competing business in Georgia, it brought suit against both Mr. and Mrs. Farrow in Texas state court.

Following removal, the district court dismissed WNS' claim for lack of personal jurisdiction. The Fifth Circuit reversed. It stressed that the dispute with respect to whether the Farrows intended to breach their agreement at the time of their sole joint visit to Texas had to be resolved in WNS' favor. *Id.* at 202-03. To the court, WNS' uncontroverted allegation that the Farrows had failed to reveal their true intentions during the course of the Houston meetings was controlling. *Id.* at 204; *accord Pizzabiocche v. Vinelli*, 772 F. Supp. 1245, 1250 (M.D. Fla. 1991); *Rockshots, Inc. v. Constock Cards, Inc.*, No. 89-CIV.-3453-CSH, 1990 WL 74514 at *2 (S.D.N.Y. May 20, 1990).



**B. Ruhrgas Deliberately Caused Injury In Texas**

Undeniably, Ruhrgas was aware that Marathon and MIOC were both Texas residents during most of the relevant time period.[11] *See, e.g.*, Exhibit 10 (where Marathon advised Ruhrgas that it had moved its corporate offices to Houston); Exhibits 3 and 7, (showing substantial correspondence with Plaintiffs in Houston). Ruhrgas concedes that it was aware that its actions allegedly would cause "Marathon" to lose $500 million, but did not consider that fact important. Hoffmann Deposition at 188:9-13, 189:5-8.

As noted above, Ruhrgas has made no effort to deny the existence of a conspiracy between itself, the Consortium and Statoil concerning North Sea gas, or its own fraudulent conduct.[12] Nor has Ruhrgas denied the significant damages suffered by the Plaintiffs. *See* Petition at ¶21, 33-35. Likewise, Ruhrgas has not denied that between the reduced gas price and the lack of tariff relief, MPCN never will be able to repay MOC or MIOC. At this point, taking as true the existence of the conspiracy and

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[11] During the earliest stages of the Heimdal field's development, both companies were based in Ohio. At all times, both companies were incorporated in Delaware. The question of contacts with these states has not been addressed by Ruhrgas, although it may be relevant if this court's jurisdiction is premised on the existence of a federal question. *See* Fed. R. Civ. P. 4(k)(2).

[12] To the contrary, Hoffmann confirmed that the conspiracy still is ongoing, acknowledging that one of the first things Ruhrgas did upon receipt of this suit was to meet with the Consortium members and call Statoil regarding the suit. *See* Hoffmann Deposition at 27-31.

fraud together with at least a foreseeable massive resulting injury ultimately falling on Texas residents, there is no question but that Ruhrgas should have foreseen the possibility of being haled into a Texas court in an action, like this one, arising out of the fraud and conspiracy. *Cf. Burger King*, 471 U.S. at 481; *accord Calder v. Jones*, 465 U.S. 783 (1984); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 772 (5th Cir. 1988); *Vault Corp.*, 775 F.2d at 640; *Hawkins v. Upjohn Co.*, 890 F.Supp. 601, 608 (E.D. Tex. 1994).

In sum, Ruhrgas' contacts with Texas related to this litigation are substantial. Ruhrgas repeatedly traveled to Houston to conduct meetings with the Plaintiffs concerning the gas field and tariffs at issue here; Ruhrgas repeatedly corresponded with the Plaintiffs in Houston by telex and telephone; and Ruhrgas knew (or at the very least, should have known) that massive injury would ultimately fall on the Plaintiffs in Houston. If these contacts are not sufficient to establish specific jurisdiction, one can scarcely imagine what connection could be.

## III. RUHRGAS' GENERAL JURISDICTIONAL CONTACTS WITH TEXAS

In addition to contacts specifically related to this litigation, Ruhrgas also has substantial, continuous and systematic contacts with Texas sufficient to create general jurisdiction. For instance, Ruhrgas maintains a permanent and intimate relationship with Houston-based Tenneco Energy Resources Corporation ("TERC"). Although mere affiliation with an in-state corporation, without more will not constitute "purposeful availment" so as to warrant



the exercise of general jurisdiction, Courts have long regarded corporate affiliations as playing a substantial role in the jurisdictional inquiry. *E.g., Energy Reserves Group, Inc. v. Superior Oil Co.*, 460 F. Supp. 483, 490 (D. Kan. 1978). In addition, Ruhrgas' relationship with TERC reveals contacts with Texas that go well beyond a "mere affiliation." Furthermore, these contacts are far from the only ones Ruhrgas routinely has with Texas. *See Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 779 (5th Cir. 1986), *cert. denied*, 481 U.S. 1015 (1987) (general jurisdiction inquiry relates to totality of defendant's contacts with forum).

### A. Ruhrgas' Active Participation In the U.S. Gas Market Through TERC

In February, 1994, Ruhrgas acquired twenty percent of the stock of Houston-based TERC for $47 million. *See* Exhibit 11 (Ruhrgas' stock purchase agreement). The transaction was negotiated for more than a year in Houston, Texas, the resulting Stock Purchase Agreement was signed in Houston, and the contract provided that Texas law would apply to any disputes. *Id.*; Benke Deposition at 42-43, 25 (attached as Exhibit 12). TERC (which is headquartered in Houston) operates approximately 2,000 miles of intrastate gas pipelines, mostly in Texas; has *annual sales* of approximately $2 billion; and controls approximately 5% of the U.S. natural gas market. Benke Deposition at 63:7-18. TERC also has several wholly owned subsidiaries that are headquartered in Texas as well. *See* Exhibit 13 (detailing TERC's corporate structure).

Through this ownership interest, Ruhrgas intends to "participate in the growth of the gas marketing business in the USA" and to "make money in [the U.S. gas marketing] business." *See* excerpts from Ruhrgas' 1993 Annual Report (attached as Exhibit 14), and Benke Deposition at 30. In connection with its purchase of TERC shares, Ruhrgas also signed a Noncompetition Agreement in Houston which prohibits Ruhrgas from conducting gas marketing activities in the U.S., Mexico or Canada "other than through TERC and its Subsidiaries." *See* Exhibit 15 at 2. That agreement also is governed by Texas law, and even contemplates the possibility of litigation in Texas. *Id.* at 4; Benke Deposition at 50.

Ruhrgas is hardly a passive investor in TERC. The head of Ruhrgas' Joint Ventures West division, Eike Benke, sits on TERC's board of directors, which is charged with managing TERC's business and affairs. *See* Exhibit 16 at 5; Benke Deposition at 7:16-19. In his affidavit attached to Ruhrgas' motion, Benke acknowledged that he "periodically travels to Houston to attend meetings." Affidavit of Eike Benke at ¶ 3 (attached to Ruhrgas' motion). Indeed – in his deposition, Benke revealed that he and two other Ruhrgas officials, including Ruhrgas' head of corporate acquisitions, travel to Houston three times a year to attend TERC board meetings on behalf of Ruhrgas. Benke Deposition at 10-11, 16. Benke and his staff *also* travel to Houston three times a year to attend TERC "Risk Committee meetings." *Id.* at 14, 71-72. Benke *also* travels to Houston to attend TERC Budget and Finance Committee meetings three times a year, although he is not a member of that committee. *Id.* at 15. Jurgen



Schneider, another Ruhrgas executive, is on TERC's Budget and Finance Committee, however, and he also attends those meetings in Houston three times each year. In addition, Benke and other Ruhrgas officials regularly travel to Houston to attend "group leader" meetings at TERC, again, approximately three times a year. *Id.* at 65-67, 69-70. All told, Benke, Schneider, and some other Ruhrgas representatives, regularly travel to Houston to attend at least 12 different business meetings every year. Copies of some of the minutes of TERC meetings Ruhrgas representatives have attended are attached as Exhibit 17.

Through TERC and Ruhrgas' other Texas connections (including meetings with leading U.S. oil and gas companies, some of which indirectly hold significant ownership interests in Ruhrgas), Ruhrgas continually conducts hands-on monitoring of the U.S. gas market.[13] This constant monitoring is an integral part of Ruhrgas' business. Benke Deposition at 75-76, 53, 64. Thus, the substantial activities detailed above are not merely undertaken to secure Ruhrgas' $47 million investment, but are a part of its overall business.

### B. Other Ruhrgas Business Trips to Texas

Ruhrgas officers also travel to Texas for the purpose of engaging in world-wide joint ventures with Tenneco,

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[13] *See* Benke Deposition at 39-40 (U.S. oil companies hold interests in Ruhrgas), 74-75 (those companies can only give Ruhrgas a momentary picture of the U.S. gas market, but Ruhrgas can continually monitor the market through TERC).

to attend business seminars, and to attend business meetings. *See* Affidavit of Lutz Eckert at ¶17 (attached to Ruhrgas' motion.); Exhibits 18 (sample of seminar) and 19 (meeting in Houston at request of Government of Russia and the World Bank attended by senior Ruhrgas officials); Bentzien Deposition at 46. Klaus Liesen, "Chairman of the Executive Board of Ruhrgas" is a member of Tenneco's European Advisory Council, which advises that company and meets twice annually in either Europe or Houston. *See* Affidavit of Dirk Plambeck at ¶3 (attached to Ruhrgas Motion).

In addition to the myriad trips and meetings described above, Benke and other Ruhrgas representatives regularly travel to Texas or the United States to conduct business on Ruhrgas' behalf. For example, Ruhrgas officials have attended various meetings concerning the U.S. domestic natural gas business with Mobil, ARCO and other leading U.S. oil and gas companies in Texas. Benke Deposition at 74, 76, 79; Exhibit 20. Also, in addition to the specific meetings reflected in the documents, Benke testified there were additional Ruhrgas visits to other companies involved in the U.S. gas market, noting that these meetings may have taken place in Houston because "an awful lot of companies that get involved in the energy business have their headquarters in Houston." Benke Deposition at 78. All of these visits reflect a "purposeful interjection in Texas and the United States. *Akanse v. Fatjo,* No. H-91-3140, 1993 U.S. Dist., Lexis 19370 at *5 (S.D. Tex. May 21, 1993).



### C. Ruhrgas Maintains Employees That Live and Work in Houston on Its Behalf

Perhaps even more significant to the general jurisdiction analysis than all of the regular Texas business meeting described above, Ruhrgas has employees that live and work in Houston on essentially a permanent basis. *Since 1994, Ruhrgas has had employees in Houston every single day.* Falkenhausen Deposition at 25-26 (attached as Exhibit 21). These employees are part of program through which Ruhrgas regularly assigns certain employees to work at TERC in Houston on a short term (one year) or long term (multi-year) basis. *See* Exhibit 22. At least two Ruhrgas employees are living in Houston right now – one has been here half a year; the other, since mid-1994. Falkenhausen Deposition at 14-15. Although this program was not formally documented until 1994, Ruhrgas has been sharing employees with Tenneco since 1992. *Id.* at 27-28; Exhibit 23. In all, since 1994, approximately 10 or 11 Ruhrgas employees have been stationed in Houston for periods ranging from several months to three years. Falkenhausen Deposition at 21-22.

When Ruhrgas employees are in Houston for a year or less, Ruhrgas pays their salaries directly. *Id.* at 19. Employees stationed in Houston longer than a year have their salaries paid by TERC. *Id.* at 18-19. Regardless of the length of stay, however, Ruhrgas continues to pay all its Houston-based employees overseas bonuses and salary differentials. *Id.* at 19. Ruhrgas maintains all of these employees in its pension schemes, and even subsidizes their housing – some employees have had apartments, and at least one rents a house in Houston. *Id.* at 26, 20, 15;

Exhibit 24. Ruhrgas also subsidizes the costs associated with sending its employees' children to private schools in Houston, and pays for a flight back to Germany every six months. *Id.* at 21. *Most importantly, all employees remain "a full time employee of Ruhrgas" while temporarily assigned to TERC. See* Exhibit 25.

These contacts are substantial, continuous and systematic by any definition. They are not, as Ruhrgas implies, merely extended "training" sessions. Quite to the contrary, Ruhrgas considers their constant presence in Houston to be beneficial to, and part of, Ruhrgas' business. Benke Deposition at 75:17-76:10. The fact that Ruhrgas maintains employees in Houston on a full time basis is itself sufficient to create general personal jurisdiction. Any of these employees could be involved in an accident, breach a rental agreement, commit a civil or criminal offense, or become involved in any number of activities that might forseeably land them in a Texas court. For Ruhrgas to claim that it could not have anticipated being haled into a Texas court when it stations multiple employees in Houston borders on being frivolous.

### D. Other Ruhrgas Contacts with Texas

In addition to the visits to MOC's offices relating to Heimdal, in addition to the visits to other Texas-based oil and gas companies to obtain information about the U.S. gas market, in addition to its substantial investment in (and regular management of) TERC, and in addition to the employees it has maintained in Houston for years,



Ruhrgas *also* purchases products and services from companies throughout Texas. These purchases are not isolated or insubstantial. To the contrary, Ruhrgas' summary of purchase orders from Texas companies alone reveals purchases totaling approximately $1 million between April 1983 and October 1995. *See* Exhibit 26. This summary of purchases includes, among others, purchases from Dresser-Rand in Houston; Global Thermoelectric in Humble; Interface Design in Houston; Southwest Research in both Dallas and San Antonio; Machinery & Piping in San Antonio; Boffin, Inc. in Frisco; ESP, Inc. in Plano; C.B. Lowe in Houston; and Gas Equipment Testing Co. of Roanoke, Texas. The summary *excludes* millions of dollars that the Ruhrgas paid to DeGaulyer & McNayhton of Dallas (apparently on behalf of the Consortium) to perform reservoir evaluation services relating to Heimdal and other North Sea fields. *See* Fels-Huber Declaration (attached as Exhibit 27); Hoffmann Deposition at 100-101. Ruhrgas' share of this expense was over $700,000. *Id.* Copies of some purchase orders Ruhrgas has sent to Texas companies are attached as Exhibit 28, further confirming the extent to which it purchases goods and services in this State. Ruhrgas also has employed a Texas headhunter to search for potential employees in Texas and elsewhere. *See* Falkenhausen Deposition at 32-33.

## IV. RUHRGAS' GENERAL JURISDICTIONAL CONTACTS WITH THE UNITED STATES

Ruhrgas has alleged that this Court has subject matter jurisdiction over this action based in part on federal

question jurisdiction.[14] Naturally, Plaintiffs disagree with this contention, but the allegation materially affects the personal jurisdiction inquiry. Amended Federal Rule 4 provides that, "with respect to claims arising under federal law," a defendant who is not subject to service in any state may be haled into court based on contacts with the United States as a whole. Fed. R. Civ. P. 4(k)(2) advisory committee note (1993 amendment); *see also* Kent Sinclair, 14 *Rev. Litig.* 159, 188 (1994) ("Rule 4(k)(2) allows courts to obtain personal jurisdiction in federal question cases over defendants based on 'nationwide contacts' ").[15] Ruhrgas does not admit to being subject to service in any State. Thus, to the extent this case is based on a federal question, the constitutional question would focus on Ruhrgas' contacts with the entire United States, not just Texas. Therefore, to the extent these rules even apply to

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[14] Ruhrgas' removal is based on three alternative grounds. First, Ruhrgas urges that the Plaintiffs' state law claims are converted into federal questions and that the state court is stripped of authority, apparently under the auspices of 28 U.S.C. § 1331, because "international issues" are involved. Second, Ruhrgas claims that an arbitration agreement between itself and a Norwegian affiliate of the Plaintiffs (not a party here) creates federal question jurisdiction under 9 U.S.C. § 201, *et seq.* Lastly, Ruhrgas claims that Plaintiff Marathon Norge, the holder of title to all of Marathon's unproduced gas, has no possible interest in this case and was therefore fraudulently joined. As a result, claims Ruhrgas, this case also may be treated as a diversity action.

[15] For additional confirmation see *Eskofot A/S v. E.I. du Pont de Nemours & Co.*, 872 F. Supp. 81, 86-87 (S.D.N.Y. 1995); David D. Siegel, *The New Rule 4 of the Federal Rules of Civil Procedure: Changes in Summons Service and Personal Jurisdiction*, 152 FRD. 249, 252-56 (1994).



this case, Plaintiffs will briefly outline Ruhrgas' substantial contacts with the U.S.

Ruhrgas does a sizable business in the United States. As its own charts detailing its holdings in the U.S. attest, Ruhrgas owns a number of substantial companies. *See* Exhibits 29 and 30. For example, Ruhrgas is the sole owner of a number of holding companies which in turn wholly own American Meter Company, a Delaware corporation operating out of Pennsylvania. Bentzien Deposition at 18-20. American Meter is the largest manufacturer of gas meters in the world. Exhibit 31. It employed more than 1, 100 people in 1988, and that number appears to be increasing. *See* Exhibit 32 (excerpt from 1988 Annual Report of Ruhrgas at 33, 56-59) and Exhibit 33 (excerpt from 1993 Annual Report of Ruhrgas at 39). It maintains offices within the United States and makes sales throughout the entire United States, including Texas. Bentzien Deposition at 20, 58. Ruhrgas reportedly purchased the company for $132 million and relocated certain of its operations to Nebraska. Exhibit 31. Ruhrgas officials sit on the board of American Meter and travel to the United States two or three times a year to attend board meetings. Bentzien Deposition at 20. Ruhrgas officials also travel to the United States to attend meetings of American Meter's wholly-owned subsidiaries. *Id.* at 68.

Similarly, Ruhrgas officials also travel to the United States to attend meetings of American Meter Holdings Company (previously known as "Ruhrgas Carbon"), American Meter's parent. *Id.* at 21, 27. That company is run by a President who is a Ruhrgas employee living in Germany. *Id.* at 64-65. Its board meetings take place in the

United States. *Id.* at 66; *see* Exhibit 34 (board meeting minutes showing Ruhrgas participation).

Ruhrgas also owns Kromschoder, Inc., an American corporation specializing in gauging and instrumentation equipment (Bentzien Deposition at 21-23); LOI, Inc., a Pennsylvania corporation that manufactures gas burners for use in the aerospace industry (*Id.* at 24); and Hauck Manufacturing, which also manufactures gas burners, although for a different application (*Id.* at 25). Both LOI and Hauck make sales throughout the United States and hold their meetings, which Ruhrgas officials attend, in the United States. *Id.* at 69-72.

Ruhrgas also owns Abar Ipsen and Centaur Vacuum. Ruhrgas officials sit on the boards of these companies and travel to the United States several times a year to attend board meetings. *Id.* at 25-26; 63. Mr. Bentzien estimated the sales of Abar Ipsen to be about $40 million; the sales of Centaur Vacuum to be about $10 million; the sales of Hauck to be about $20 million; and the sales of LOI to be about $4 to $5 million. *Id.* at 29.

Ruhrgas purchases millions of dollars worth of goods and services from U.S. companies. A Ruhrgas-prepared summary of its U.S. purchases is attached as Exhibit 26. In addition to these purchases, Ruhrgas also purchases accounting services from Arthur Andersen, apparently on behalf of American Meter Co., in Philadelphia. *See* Exhibit 35. That firm, and Price Waterhouse, also did work for Ruhrgas in Texas in connection with Ruhrgas' acquisition of its interest in TERC. Bentzien Deposition at 71; Exhibit 36. At one point, Ruhrgas also maintained bank accounts in the United States as well. Bentzien Deposition at 74.



These facts, considered in connection with Ruhrgas' numerous other Texas contacts described earlier, reveal a continuous relationship with the United States. Accordingly, having availed itself repeatedly of the privilege of conducting activities here, Ruhrgas cannot reasonably assert that it has been unfairly surprised by the prospect of defending a lawsuit here. *See Holt Oil & Gas Corp.*, 801 F.2d at 777.

## V. THE EXERCISE OF JURISDICTION OVER RUHRGAS IS CONSISTENT WITH DUE PROCESS

The second prong of the due process analysis requires that the exercise of jurisdiction not offend the traditional notions of fair play and substantial justice. *Burger King*, 471 U.S. at 476; *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945). Where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable. *Burger King*, 471 U.S. at 477. Such considerations usually may be accommodated through means short of finding jurisdiction unconstitutional, such as application of choice of law rules. *Id.* When minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even serious burdens placed on the alien defendant. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114 (1987).

In assessing whether the exercise of personal jurisdiction offends the traditional notions of fair play and substantial justice, the court should consider (1) the interest of the forum state, (2) the plaintiffs interest in obtaining relief, (3) the burden on the defendant, (4) the shared interest of the several states in furthering fundamental substantive social policies, and (5) the interstate judicial system's interest in obtaining the most efficient resolutions of controversies. *Burger King*, 471 U.S. at 477; *Asahi*, 480 U.S. at 113; *Command-Aire Corp. v. Ontario Mechanical Sales & Serv. Inc.*, 963 F.2d 90, 95 (5th Cir. 1992). Many of these factors are discussed in considerable detail in Plaintiffs Response to Ruhrgas Motion to Dismiss on Forum Non Conveniens Grounds, which was filed on February 8, 1996, and Plaintiffs incorporate that discussion here.

In this case, Texas has a strong interest in providing an effective means of redress to Plaintiffs for Ruhrgas' participation in a fraud and conspiracy whose object and practical effect was to drain MOC and NHOC of hundreds of millions of dollars and to deprive Norge of the value of its interest in the Heimdal field. MOC and MIOC are both based in Houston, Texas. This case concerns well founded allegations that Ruhrgas lured Marathon and other affiliated corporations into advancing hundreds of millions of dollars of capital into a development project in the North Sea. To a significant extent, these loans remain unpaid and their proceeds have unjustly enriched Ruhrgas and others with whom it has conspired. Were it not for Ruhrgas' misrepresentations and fraudulent omissions, these funds still would be available to MOC and MIOC. Plainly, the State of Texas has a legitimate interest in providing recourse to its domestic energy industries



above and beyond its usual interest in redressing wrongs committed on its citizens within its borders. *See, e.g., Burger King*, 471 U.S. at 473 ("A state generally has a 'manifest' interest in providing its residents with a convenient forum for redressing injuries caused by out-of-state actors."); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) (recognizing Texas' peculiar interest in regulating domestic energy production).

Moreover, Plaintiffs have an obvious interest in pursuing relief in their home state. This is not a case in which the plaintiff has chosen some remote forum to harass a defendant with no connection to it. Marathon and NHOC are based not only in this State, but in this district. The vast majority of their witnesses and documents are here. Accordingly, they have a substantial, legitimate interest in proceeding here. *E.g., Sea-Lift. Inc. v. Refinadora Costarricense de Petroleo, S.A.*, 792 F.2d 989, 993 (11th Cir. 1986).

Further, Ruhrgas is no more inconvenienced by defending here than is any other defendant. To be sure, Ruhrgas probably does not want to add defending this case to the list of activities it already conducts in Houston. Nonetheless, its preference to defend itself in Germany or "Europe" is not controlling. In view of its deliberate decisions to procure the benefits of funding from a Texas corporation and to travel here to obtain continued funding, it is hardly "unfair" to require a return visit related to that issue. The same is true of the extensive nature of Ruhrgas' holdings in the United States. Certainly, Ruhrgas has not shown that litigation in Texas would be so "gravely inconvenient" that it would be at such a "severe disadvantage" as would warrant a dismissal on grounds of unfairness. *Burger King*, 471 U.S.

at 478. If anything, the sheer number of Ruhrgas' filings to date and its willingness to contest every conceivable issue demonstrate otherwise.

## CONCLUSION

Given the nature and extent of Ruhrgas' contacts with Texas, including personal visits to the State relating to the Heimdal field and the permanent stationing of its own employees in Houston, it is absurd, albeit predictable, that Ruhrgas denies personal jurisdiction. It is difficult to conjure a more convincing specific jurisdiction case, and the only way Ruhrgas could have more general contacts would be for it to open a Houston office in addition to TERC. Clearly, Ruhrgas has sufficient contacts with this State to permit a Texas court to exercise personal jurisdiction over it. That jurisdiction is consistent with the Due Process Clause. Accordingly, Defendant's Motion to Dismiss for Lack of Personal Jurisdiction should be denied in all respects.

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